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NORTH CAROLINA ATTORNEY GENERAL REPORTS

VOLUME 41

ROBERT MORGAN
ATTORNEY GENERAL

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NORTH CAROLINA

ATTORNEY GENERAL

REPORTS

Opinions of the Attorney General
July 1, 1970 through December 31, 1970

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7 July 1970

Subject: Public Officers & Employees; Retirement; Teachers' and State Employees' Retirement System; Creditable Service; Sick Leave; Not Creditable to Meet Disability or Early Retirement Minimum Years of Service.

Requested by: Mr. J. E. Miller, Director
Teachers' and State Employees' Retirement System

Question: May sick leave standing to an employee's credit be counted in determining whether he has met the service requirements necessary to be eligible for disability or early retirement?

Conclusion: Sick leave standing to an employee's credit may not be counted in determining whether he has met the service requirements necessary to be eligible for disability or early retirement.

G. S. 135-4(e) reads as follows:

> "(e) Creditable service at retirement on which the retirement allowance of a member shall be based shall consist of the membership service rendered by him since he last became a member, and also if he has a prior service certificate which is in full force and effect, the amount of service certified on his prior service certificate; and *if he has sick leave standing to his credit upon retirement on or after July 1, 1967*, one month of credit for each 20 days or portion thereof, but sick leave shall not be counted in computing creditable service for the purposes of G. S. 135-3 (8) a." (*Emphasis added*)

The sick leave provision was added by the 1967 General Assembly. Various provisions of the statutes fix certain minimum years of

creditable service for disability or early retirement. In determining how to apply sick leave credit provided for in G. S. 135-4(e), the key words are those underlined above which indicate clearly that sick leave credit is only allowed "upon retirement" and a person would not be eligible for sick leave credit until he has met through other creditable service the minimum requirements to enable him to retire. Once it is determined that he has met the qualifications for disability or early retirement, then there may be added to the length of his service in computing benefits, "sick leave standing to his credit upon retirement."

Robert Morgan, Attorney General
Harry W. McGalliard
Deputy Attorney General

- - -

26 August 1970

Subject: Civil Defense; Power of Local Political Subdivisions in Civil Defense or Riot and Civil Disorder Emergencies

Requested by: Mr. James W. Denning, Director
Civil Defense Agency

Questions: (1) When a state of emergency or a state of civil defense emergency is declared by the governing body of a county, would this be effective in the incorporated areas within the municipalities of the county or would it be necessary for the governing bodies of the county and the municipalities to make declarations in order that the entire county be covered?

(2) If a state of emergency, rather than a state of civil defense emergency, as

described in G. S. 166-8(b) is declared by the Governor or the governing bodies of political subdivisions, to what extent generally are the state and political subdivisions empowered beyond their normally existing powers?

Conclusions:

(1) When a state of civil defense emergency is declared by the governing body of a county, this would be effective within incorporated municipalities within the county and it would not be necessary for the municipality to declare a state of emergency to exist except where it were necessary for municipal funds or personnel to be used in aid of the emergency situation.

When a state of emergency is declared pursuant to the provisions of Article 36A of Chapter 14 of the General Statutes, the county declaration of an emergency does not apply within incorporated municipalites.

(2) If a state of emergency is declared pursuant to the provisions of Article 36A of Chapter 14 of the General Statutes, rather than declaration of a state of civil defense emergency, the powers of the municipalities are contained in G. S. 14-288.12 and the powers of the counties are as contained in G. S. 14-288.13. The Governor's powers are contained in G. S. 14-288.15.

This opinion deals with the authority of local governing bodies and not their agents or other local agencies such as a local civil defense agency.

As to declarations of a state of civil defense emergency pursuant

to the provisions of G. S. 166-8(b), there would appear to be no limitation on counties, when declaring a county-wide civil defense emergency, in acting within the corporate limits of a municipality within that county. However, in order to expend municipal funds, make contracts, employ or use personnel or other resources of the municipality, the municipality must join in a declaration of such an emergency to authorize use of municipal funds and materials as the county declaration of an emergency would have no effect on municipal resources as such.

As to declarations of a state of emergency in case of riots and civil disorders pursuant to the provisions of Article 36A of Chapter 14 of the General Statutes, G. S. 14-288.13 provides that where the governing body of a county would enact an ordinance setting up provisions in event of declaration of such an emergency, the ordinance would not apply within the corporate limits of any municipality or within any area of the county over which the municipality has jurisdiction unless the municipality by resolution would consent to such an ordinance. Absent such consent, therefore, the county would have no authority within any municipality within its territorial limits.

In a state of emergency in event of riot or civil disorder rather than in a civil defense emergency, the ordinance of a municipality or of a county which might have been previously enacted or would then be enacted would extend the authority of those local government units to such areas as are allowed by G. S. 14-288.12 and G. S. 14-288.13. The Governor's powers are listed in G. S. 14-288.15. Of course, all of the provisions of the riot and civil disorder article in Chapter 14 deal with extension of authority of law enforcement officers and other public officials in event of such an emergency and, without being confronted with specific factual situations, we cannot suggest an exhaustive list of the particular powers which might be involved.

Robert Morgan, Attorney General
(Mrs.) Christine Y. Denson,
Staff Attorney

- - -

20 July 1970

Subject: Education; Assignment of Pupils; Assignment on the Basis of Geographic Zones; Residence of Pupils; Appointment of Guardian to Change a Pupil's Residence

Requested by: Mr. A. C. Davis, Controller
N. C. State Board of Education

Questions:

(1) What is the authority of a county or a city board of education in assigning pupils on the basis of georgraphic zones?

(2) How may a pupil's residence in a zone be determined?

(3) When parents are living, may persons other than the parents be appointed the legal guardian of the child for purposes of establishing residence in another geographic zone for purposes of pupil assignment?

Conclusions:

(1) The county and city boards of education clearly have authority to assign pupils based on geographic zones.

(2) Residency within the pupil assignment statutes is used in the sense of being the child's "permanent home."

(3) It would appear that a guardian may not be appointed in order to circumvent the pupil assignment plans where both parents are living and capable of caring for the child.

The inquiry relates to pupils who reside within the Durham County School Administrative Unit (system) who are assigned under a geographic zone plan to a particular school within the system and who wish to attend a school within the system but without the

geographic zone of their residence. In this regard, the inquiry advises:

> "Some local attorneys are telling their clients that pupils can move in with relatives or friends on the other side of town under certain conditions and thereby establish legal residence there. Several pupils have already done this."

It is beyond question that county and city boards of education have authority to assign pupils under a geographic plan. North Carolina G. S. 115-163 states in pertinent part the following:

> "All pupils residing in a school district or attendance area, and who have not been removed from school for cause, shall be entitled to all the privileges and advantages of the public schools of such district or attendance area in such school buildings to which they are assigned by county and city boards of education."

You will note from the above quotaton that the key words are: "All pupils residing in a school district *or attendance area*." Further along in this same statute we have a more detailed explanation as to the right of pupils to attend the public schools and the circumstances under which the boards of education may assign these pupils to particular attendance areas within the school administrative unit. I quote from the last few paragraphs of North Carolina G. S. 115-163 as follows:

> "Unless otherwise assigned by the county or city board of education, the following pupils are entitled to attend the schools in the district or attendance area in which they reside:
>
> (1) All pupils of the district or attendance area who have not completed the prescribed course for graduation in the high school.
>
> (2) All pupils whose parents have recently moved into the unit,

district, or attendance area for the purpose of making their legal residence in the same.

(3) Any pupil or pupils living with either father, mother or guardian who has made his or her permanent home within the district."

In further support of the local board's authority to assign pupils residing within the administrative unit in any manner which the board thinks best, North Carolina G. S. 115-176 states:

> "Each county and city board of education is hereby authorized and directed to provide for the assignment to a public school of each child residing within the administrative unit who is qualified under the laws of this State for admission to a public school. Except as otherwise provided in this article, the authority of each board of education in the matter of assignment of children to the public schools shall be full and complete, and its decision as to the assignment of any child to any school shall be final."

In the last quotation above you will find the key words are: "Each child *residing* within the administrative unit who is qualified under the laws of this State for admission to a public school." You will further note that in the quotation from the last part of North Carolina G. S. 115-163 the word "reside" is again used and that as to parents who have recently moved into the unit, district, or attendance area, these are required to have moved into such areas "for the purpose of making their legal residence in the same." You will note that for the first time the word "residence" enters into the problem and again in this same portion of North Carolina G. S. 115-163 we find that a pupil or pupils who are living with either father, mother or guardian "who has made his or her permanent home within the district." It is noted that the words "permanent home" are used as descriptive words of eligibility.

No doubt there are many shades of meaning that may be used in

connection with the words "domicile", "residence", and "residing" but for the purposes expressed in the public school statutes these words all have practically the same meaning and this is strengthened by the further use of the words "permanent home" which are used in G. S. 115-163 with reference to the eligibility of pupils to attend the schools.

In *Howard v Coach Co.*, 212 N. C. 201, 203, the Supreme Court of North Carolina discusses these terms as follows:

> "In *Horne v Horne*, 31 N. C. 99 (107), speaking to the subject, it is said: 'The term domicile, in its ordinary and familiar use, means the place where a person lives, or has his home; in a large sense, it is where he has his true, fixed, and permanent home, to which, when absent from it, he intends to return, and from which he has no present purpose to remove. Two things, then, must occur to constitute a domicile—first, residence, and second, the intention to make it a home—the fact and the intent.' *S. v Carter*, 194 N. C. 293; S. c., 195 N. C. 697.
>
> "In *Watson v R.R.*, 152 N.C. 215 (217), it is written: 'Probably the clearest definition is that in *Barney v Oelrices*, 136 U. S. 529: "Residence is dwelling in a place for some continuance of time, and is not synonymous with domicile but means a fixed and permanent abode or dwelling, as distinguished from a mere temporary locality of existence; and to entitle one to the character of a 'resident', there must be a settled, fixed abode, and an intention to remain permanently, or at least for some time, for business or other purposes.' To same effect, *Coleman v Territory*, 5 Okla., 201: 'Resident indicates permanency of occupation as distinct from lodging or boarding or temporary occupation. 'Residence' indicates the place where a man has his fixed and permanent abode and to which, whenever he is absent, he has the intention of returning.' In *Wright v Genessee*, 117 Mich. 244, it is said: 'Residence means the place where one resides; an abode, a dwelling or

> habitation. Residence is made up of fact and intention. There must be the fact of abode and the intention of remaining.' And in *Silvey v Lindsay*, 42 Hun. (N.Y.), 120: 'A place of residence in the common-law acceptation of the term means a fixed and permanent abode, a dwelling place for the time being, as contradistinguished from a mere temporary local residence.' *In Re Ellis*, 187 N. C. 840 (942)."

some cases there may be a difference between "domicile" and esidence" although the two words do not necessarily mean the me thing. The distincitions are pointed out in 77 C. J. S. Residence) p. 289, and in 28 C. J. S. (Domicile) p. 5, sec. 2. ee also: 17A Am. Jur., Domicile p. 194, sec. 1. As to the various ades of the meaning of the word "residence" as construed by e Supreme Court of North Carolina, see *Owens v Chaplin*, 228 . C. 705; *In Re Martin*, 185 N. C. 472, 475; *Reynolds v Cotton ills*, 177 N. C. 412; *Barker v Insurance Co.*, 241 N. C. 3977; *aker v Varser*, 240 N. C. 260, 267, 268.

s to the fact that the word "residing" means the same thing as residence", see the case of *Oliver v Oliver*, 219 N. C. 299, where divorce statute required that the plaintiff must have resided in e State for a period of a year and the instructions of the judge f the Superior Court which made this equivalent to "residence" hich are approved by the Supreme Court of North Carolina in is case.

s to the word "reside", we find that Webster's New International ictionary (Second Edition) defines the word as follows:

> "To dwell permanently or continuously; to have a settled abode for a time; to have one's residence or domicile."

hat the word "reside" has the meaning of a permanent abode and in many cases equivalent to the word "residence", see *Graham Commonwealth*, 51 Pa. 255, 258, 88 Am. Dec. 581; *Longwell Longwell*, 88 S. W. 416, 417 (Texas); Cochran v Cochran, 162 . E. 99 (Ga.); *People v Owers*, 69 P. 515, 518 (Colo.); *Shattuck Maynard*, 3 N. H. 123, 124; *Phillips v City of Boston*, 67

N. E. 250 (Mass.).

It would appear, therefore, that the child must attend the scho which serves his grade within the geographic zone in which he resid and to which he has been assigned by the local board of educatio Moreover, the child should not be allowed to circumvent h assignment by moving in with friends or relatives who reside in different geographic zone if the sole purpose of his moving is attend a different school within the administrative unit. There no decision of the Supreme Court of North Carolina or any oth jurisdiction on this particular issue. However, there are cas elsewhere which use similar rationale. In the case of *In R Schnipper's Guardianship*, 288 N. Y. S. 382, the New Yo Supreme Court held that an infant's application for the appointme of a resident guardian of her person for the sole purpose transferring her legal residence from another State to New Yo State (New York City) so that she could obtain a gratuitio education at the city's expense should be denied. New York Ci had a charter provision which made its common schools availab to pupils whose parents or guardians were actually residents of t city. The New York Court said:

> "The appointment of a guardian of the person for the sole purpose of transferring the legal residence of the infant from another State to New York City, so that she may obtain gratuitous education at the expense of the city, would circumvent the spirit as well as the letter of the above cited section of the charter."

The "guardian" as used in our attendance area statute (G. S. 115-163) refers to a regular guardian as contemplated by Chapter 33 of the General Statutes of North Carolina, as amended.

There are two types of guardians under our law: (a) guardian o the person, and (b) guardian of the estate. The jurisdiction t appoint guardians in this State is vested in the clerk of the superio court (G. S. 33-1) and the clerk may make a separate appointme of guardian of the person and another as guardian of the estat (G. S. 33-6). Guardians are appointed for infants, idiots, lunatics or inebriants, and, strictly speaking, guardianship relates to orphan (G. S. 33-1), and a child who has a father or mother, or both

ing who are competent and able to look after the child could ırcely create a situation where a guardian could be appointed. rthermore, the appointment of a guardian is a matter almost mpletely within the jurisdiction of the clerk of the superior court, d the clerk acting in a judicial capacity has the right to decide hether a guardian should be appointed or not. It was held earlier the Supreme Court of North Carolina that the appointment of guardian was a discretionary matter. *Donald v Vick*, 15 N. C. 294. oreover, the father, under our statutes, is the natural guardian of s minor child, which makes him guardian of the person, and upon e father's death the mother becomes the natural guardian of her nor child to the same extent that the father would be if living. *Re Hoopen's Custody*, 282 N. C. 223; N. C. G. S. 33-3. As the circumstances which affect the appointment or n-appointment of a guardian, see generally 39 C. J. S., ıardian and Ward, sections 6 and 7, pp. 17 and 18.

ıerefore, it is hard to envision why or how a clerk in one county n appoint a guardian for a child whose parents are living and siding in the same county unless some extradordinary cumstances such as abandonment of the child or things of that ture in fact occur. It boils down to the fact that there appears be no authority of law for the appointment of a guardian for e mere purpose of having a child attend a selected public school. the child has a guardian properly appointed for real guardianship ırposes, then the residence of the guardian can be a factor to termine the proper legal attendance of the child in our public hools.

conclusion, where county and city boards of education have tablished geographic attendance areas within the administrative nit, pupils residing within the geographic attendance area may not nove in with friends or relatives on the other side of town" who ve within a different geographic attendance area for the sole ırpose of attending a school within the administrative unit other an the one to which the pupil has been previously assigned by e county or city board of education.

Robert Morgan, Attorney General
Andrew A. Vanore, Jr.,
Assistant Attorney General

31 August 1970

Subject: Municipalities; Water and Sewage Systen Authority to Improve and Maintain Sewa Drains Extending Beyond Municipal Lim

Requested by: Honorable R. Odell Payne
Representative from Guilford County
North Carolina General Assembly

Question: When a creek, lying partially within ai partially without municipal limits, utilized by the municipality as a sewa drain, is authority vested in tl municipality or in the county to acqui rights-of-way or easements necessary dredge and maintain for sewage purpos that portion of the creek lying outside tl municipal limits?

Conclusion: The municipality and the county each ha authority to acquire rights-of-way ar easements necessary for the improveme and maintenance for sewage pruposes those portions of the creek lying outsic municipal limits; and the county and tl municipality may jointly participate such improvement and maintenanc including acquisition of necessai rights-of-way and easements.

The facts as set forth indicate that the City of Greensboro discharge treated waste from its waste treatment plant into Buffalo Creel The creek flows outside the municipal limits across Guilford Count and eventually into the Haw River. The City of Greensboro ha undertaken a program of dredging the creek within the municipa limits, and it is desirable to continue such dredging beyond th municipal limits in order to improve the flow within the creek. I order to accomplish such dredging, it will be necessary to secur rights-of-way or easements from abutting owners of private property

ere are numerous statutes which set forth the powers and thority of counties and municipalities with regard to sewage and inage systems. The statutes considered to be applicable and ntrolling in the present instance are hereinafter set forth.

ATUTES RELATING TO MUNICIPALITIES:

S. 160-204 specifically authorizes a municipality to purchase "any d, right of way, water right, privilege, or easement, within or tside the city" as may be necessary "for the purpose of opening, ablishing, building, widening, extending, enlarging, maintaining, operating any...sewerage or drainage systems" owned or operated the city or in its behalf. G. S. 160-205 authorizes the nicipality to acquire such property rights for such purposes by ndemnation.

S. 160-239 authorizes a municipality to establish and maintain sewage system and "if it shall be necessary in obtaining proper tlets to such system to extend the same beyond the corporate its," to "condemn a right-of-way or rights-of-way to and for such tlets. . . ."

S. 160-255 authorizes a municipality to own and maintain a sewer tem and empowers it "to acquire and hold rights-of-way, water hts, and other property within and without the city limits."

S. 153-9(46) authorizes a county to "acquire, construct, onstruct, extend, improve, operate, maintain, lease and dispose ..sanitary sewer systems."

S. 153-284 authorizes the board of county commissioners of any unty to "(1) Acquire, lease..., construct, reconstruct, improve, end, enlarge, equip, repair, maintain and operate any...sanitary verage system or parts thereof, either within or without the undaries of the county and to acquire in the name of the county gift, purchase or eminent domain...improved or unimproved lands rights in land, and to acquire such personal property or water hts as it may deem necessary . . . ."

S. 153-285 authorizes the board of county commissioners "to vide...sewerage services to any and all persons including...

municipalities...either within or without the boundaries of t
county . . . ."

G. S. 153-287 authorizes "Any county or municipality and any oth
county or counties or municipality or municipalities...jointly
acquire, lease..., construct, reconstruct, improve, extend, enlarg
equip, repair, maintain and operate...any sanitary sewer system
parts thereof, either within or without the boundaries of any su
counties or municipalities, and to acquire by gift, purchase or t
exercise of eminent domain...any improved or unimproved lands
rights in land, and to acquire such personal property or water righ
as may be deemed necessary. . . ."

In the appropriate circumstance, the board of county commissione
is authorized by Articles 2 and 12 of Chapter 156, North Caroli
General Statutes, to provide for the cleaning out and draining
any non-navigable stream, creek, swamp or branch to protect t
public health.

There is very substantial authority, therefore, for either the Ci
of Greensboro or Guilford County, separately, or both jointly,
improve, dredge, and maintain Buffalo Creek for sewage purpos
and to secure property or rights in property necessary for su
purposes.

Robert Morgan, Attorney General
Henry T. Rosser,
Assistant Attorney General
Parks E. Icenhour,
Assistant Attorney General

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31 August 1970

Subject: Administration of Estates; Guardian
Appointment of Child's Guardian Wh
Parents are Living

Requested by: Honorable Ben G. Floyd, Jr.

Clerk of Superior Court
Robeson County

estion: Does the clerk of superior court have authority, when both parents are living together and providing the support and maintenance for a child, to appoint another person as guardian for that child upon application of the parents?

nclusion: The clerk of superior court does not have authority, when both parents are living together and providing the support and maintenance for a child, to appoint another person as guardian for that child upon application of the parents.

e inquiry indicates that there has been a rise in the number of plications for appointment of a guardian over the person of ants. This application is made by the parents of the child who living together and providing the entire support for the child. appears that such applications may be made for pupil assignment schools under the guardians' rather than the parents' address.

apter 33 of the General Statutes dealing with appointment of rdians lists the situations in which guardians may be appointed. is occurs where there is no natural guardian (G. S. 33-1.1), where parents appoint a guardian by their will when they are the last viving parent (G. S. 33-2), the appointment of mother as rdian upon the death of the father (G. S. 33-3), the appointment a guardian upon divorce of the parents (G. S. 33-4), and the ointment of a guardian when the father is living (G. S. 33-5). ly the latter statute would appear to have any application to situation posited in your letter. That statute provides:

> "§ 33-5. *Appointment when father living.* - The clerk of the superior court may appoint a guardian of the estate of any minor, although the father of such minor be living. And the guardian so appointed shall be governed in all respects by the laws relative to guardians of the estate in other cases, but shall have

no authority over the person of such minor."

It would appear that G. S. 33-5 does not give the clerk authorit to appoint a guardian in the instance mentioned in your letter. would seem that the purpose of the section is to provide someon to control the estate of the minor when his father might otherwis be incompetent to do so but the statute specifically exclude guardianship of the person of the minor. G. S. 33-6 provides fo separate administration of guardianships of the person and the estat of a minor.

Since the appointment of guardians is now governed by statuto authority, there would seem to be no other jurisdiction in the cou to appoint a guardian. While it is well established that the cour of our State are the guardians of minors and their estates, the would appear to be in the instances posited in your letter no threa of immediate harm to the person or property of the infant an the court's jurisdiction would not adhere.

Enclosed for your further information is a copy of th July 20, 1970, opinion to Mr. A. C. Davis, Controller, State Boa of Education, which deals with some of the education law questio for which this opinion on the authority of the clerk is a supplemen

Robert Morgan, Attorney General
(Mrs.) Christine Y. Denson,
Staff Attorney

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31 August 1970

Subject: Motor Vehicles; Drivers' Licenses; Limite Driving Privilege; Modification of Judgme

Requested by: Judge John T. Brock
Davie County Criminal Court

Question: Defendant is convicted of a first offen of driving under the influence

intoxicating liquor and given a suspended sentence. After the term of court has expired, may the judge reopen the case and grant the defendant a limited driving privilege?

Conclusion: After the term of court during which defendant was convicted and judgment entered upon that conviction, the court has no authority to reopen the case and grant defendant a limited driving privilege. NCAG Opinion of 18 September 1969, to Commissioner Joe W. Garrett, Department of Motor Vehicles.

n the above opinion, it is stated:

"I am of the opinion that inferior courts have no authority to vacate or modify correct and valid judgments after the term during which they are rendered has expired. This opinion I feel is substantiated by decisions of the Supreme Court of North Carolina, beginning with *State v. Warren*, 92 N. C. 829 (1885), and including *State v. McLeod*, 222 N. C. 142 (1942), and *State v. Lawrence*, 264 N. C. 220 (1965). In the case of Recorder's Courts, this rule of law has been codified as G. S. 7-221 which reads as follows:

'When any case has been finally disposed of by the recorder and judgment pronounced therein, the case shall not thereafter be reopened or the judgment or sentence rendered therein changed, modified or stricken out by the recorder after the adjournment of the weekly term of court or after the adjournment of

any special term of court by the recorder.'"

The opinion further states:

> ". . . ex post facto actions purporting to vacate or modify correct and valid judgments would appear to infringe upon the exclusive prerogative of the Governor to exercise the power of pardon or discharge. In *State v. Lewis*, 246 N. C. 249 (1946), the Court said:
>
> > "After a defendant has begun the service of his term ... it is beyond the jurisdiction of the judge to alter it or interfere with it in any way. The power of pardon, parole or discharge during the term of imprisonment is by the Constitution the exclusive prerogative of the Governor.'"

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

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1 September 1970

Subject: Social Services; Medical Assistance; Elimination of a Category of Services; Elimination of a Category of Persons for Whom Payments Are to be Made; Reduction in Rates of Payment.

Requested by: Mr. Clifton M. Craig, Commissioner
State Department of Social Services

Questions: (1) May the State Board of Social Services

lawfully eliminate from the Medical Assistance program any category of services which are described in section 8(b) of the special provisions of the 1969 Appropriations Act as follows: "hospital care (in-patient and out-patient), x-ray, laboratory, physicians services (practitioners of medicine or surgery, podiatry, and osteopathy), home health services, nursing home care, drugs, dental care and dentures, optometric services and eye glasses"?

(2) May the State Board of Social Services lawfully eliminate, as a category of persons for whom payments are to be made, the "medically indigent" described in section 8(a) (2) of the special provisions of the 1969 Appropriations Act as "individuals who are over 65 years of age, or are permanently and totally disabled, or are blind, or are members of families with dependent children, and whose incomes are insufficient to provide necessary medical care, as determined by the Board of Social Services"?

(3) In the absence of any federal requirement to the contrary, may the State Board of Social Services lawfully make a reduction of rates of payment to providers of the items and services listed in section 8(b) of the special provisions of the 1969 Appropriations Act as follows: "hospital care (in-patient and out-patient), x-ray, laboratory, physicians services (practitioners of medicine or surgery, podiatry, and osteopathy), home health services, nursing home care, drugs, dental care and dentures, optometric services and eye glasses"?

onclusions: (1) The State Board of Social Services may not lawfully eliminate from the Medical Assistance program any category of services which are described in sectionn 8(b) of the special provisions of the 1969 Appropriations Act as

follows: "hospital care (in-patient and out-patient), x-ray, laboratory, physicians services (practitioners of medicine or surgery, podiatry, and osteopathy), home health services, nursing home care, drugs, dental care and dentures, optometric services and eye glasses".

(2) The State Board of Social Services may not lawfully eliminate, as a category of persons for whom payments are to be made, the "medically indigent" described in section 8(a) (2) of the special provisions of the 1969 Appropriations Act as "individuals who are over 65 years of age, or are permanently and totally disabled, or are blind, or are members of families with dependent children, and whose incomes are insufficient to provide necessary medical care, as determined by the Board of Social Services".

(3) In the absence of any Federal requirement to the contrary, and subject to the approval of the Advisory Budget Commission, the State Board of Social Services may lawfully make a reduction of rates of payment to providers of the items and services listed in section 8(b) of the special provisions of the 1969 Appropriations Act as follows: "hospital care (in-patient and out-patient), x-ray, laboratory, physicians services (practitioners of medicine or surgery, podiatry, and osteopathy), home health services, nursing home care, drugs, dental care and dentures, optometric services and eye glasses".

Alluding to conclusions (1) and (2), it appears that the Appropriations Act expresses the intent of the Legislature that none of the categories of eligible persons nor any category of items or services described in section 8(a) and (b) of the special provisions of the Act may be eliminated. In the Act, the list of services is preceded by the words "The services provided will be limited to" and the list of eligible categories of persons is preceded by the words "Persons eligible for services will be limited to". It is thought that

these are affirmative statements of what categories of persons and services will be included, and not merely a statement of the limits not to be exceeded by the State Board of Social Services. This view is supported by the introductory statement in section 8 of the special provisions that "Funds appropriated...for the purpose of implementing Title XIX (Medicaid) effective January 1, 1970, *are intended to provide for the following.*" (*Emphasis added*)

Conclusion No. (3) is based upon the pertinent portions of the special provisions of the 1969 Appropriations Act as follows:

> "Sec. 7. Appropriations made herein to the various State agencies for the purpose of purchasing medical, dental, optometric and hospital services, including all services provided under Title XIX of the Social Security Act, and for care in homes for the aged, *will be disbursed on the basis of rates and fee schedules approved by the Advisory Budget Commission.* (*Emphasis added*)
>
> "Sec. 8. . . .(g)The Department of Social Services will develop the State Plan for Title XIX to meet State and Federal requirements and establish policies to assure adequate program control *subject to the approval of the Advisory Budget Commission.*" (*Emphasis added*)

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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2 September 1970

Subject: Counties; Buildings; Removal of Social Services Personnel and Equipment to New Quarters; Inapplicability of G. S. 153-9(9) Requiring a Unanimous Vote of the Commissioners and a Specified Published Notice.

Requested by: Mr. Edgar P. Israel, Director
Haywood County Department of Social Services

Question: In order to move the Haywood County Social Services Department from quarters in the County Education Building, are the Haywood County Commissioners under legal obligation to comply with the provisions of G. S. 153-9(9) requiring a unanimous vote of the Commissioners and requiring a specified published notice for the removal, or the designation of a new site for, any county building?

Conclusion: In order to move the Haywood County Social Services Department from quarters in the County Education Building, the Haywood County Commissioners are not under legal obligation to comply with the provisions of G. S. 153-9(9) requiring a unanimous vote of the Commissioners and requiring a specified published notice for the removal, or the designation of a new site for, any county building.

It is recognized that moving the brick and mortar or other materials making up a building, or designating a new site for a building required by statute to be known by a specified name, such as a courthouse, would fall within the purview of the statutory provision under consideration.

However, it is not perceived that the moving of personnel, equipment, and materials from quarters in a building also occupied by the County Department of Education constitutes the moving a building or the designation of a new site for a county building within the meaning of the statute under consideration. Hence the conclusion stated above.

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

2 September 1970

Subject: Counties; Salaries of Officers; Conflict in Local and General Acts

Requested by: Mr. James R. Sugg
Craven County Attorney

Question: May the Craven County Board of Commissioners increase the Sheriff's salary during an election year under the provisions of Chapter 842, Session Laws of 1959, or must the Board of Commissioners follow the procedures set forth in G. S. 153-48.1 as enacted by Chapter 358, Session Laws of 1969?

Conclusion: Chapter 842, Session Laws of 1959, was not repealed by Chapter 358, Session Laws of 1969, and the County Commissioners should proceed under the authority of the 1959 special act to fix the salary of the Sheriff of Craven County.

The Board of County Commissioners of Craven County desire to increase the sheriff's salary at this time, but some question has arisen as to the Board's authority to proceed under Chapter 842, Session Laws of 1959, due to the provision contained in G. S. 153-48.1 relating to the procedure to be followed for increasing the salary of an elective officer in an election year.

Section 3 of Chapter 358, Session Laws of 1969, provides that all special, local and private acts *fixing* the number, salaries, fees, allowances and other compensation of county officers shall continue in full force and effect until superseded by action taken in accordance with the provisions of this Act. It is noted that Chapter 842, Session Laws of 1959, does not *fix* the salary of the Sheriff of Craven County, but authorizes the County Commissioners to increase any salaries and allowances paid to any officer of Craven County.

Thus, Chapter 842, Session Laws of 1959, was not repealed by the 1969 Act and since it does not fix the salaries of officers, it would appear that there is no procedure whereby the special act can be superseded by any action taken under the provisions of the 1969 Act.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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2 September 1970

Subject: Courts; Juveniles; Jurisdiction; Rape or Assault with Intent to Commit Rape

Requested by: Mr. Charles B. Winberry
Chief District Prosecutor
Seventh Judicial District

Questions:

(1) If a 13 year old male has committed an offense which would be a capital crime if committed by an adult, may he be bound over to the superior court for trial after a finding of probable cause by a district court judge under G. S. 7A-280, and may any person under the age of 14 years be placed on trial in superior court for an alleged crime?

(2) If a 13 year old male has committed an offense which would be a capital crime if committed by an adult, is it proper for his case to be heard as a juvenile hearing in district court?

(3) May a 13 year old male be convicted of rape or assault with intent to commit rape in North Carolina?

Conclusions:

(1) If a 13 year old male has committed an offense which would be a capital crime if committed by an adult, he may not be bound over to the superior court for trial after a finding of probable cause by a district court judge under G. S. 7A-280. No person under the age of 14 years may be placed on trial in superior court for an alleged crime.

(2) If a 13 year old male has committed an offense which would be a capital crime if committed by an adult, it is proper for his case to be heard as a juvenile hearing in district court.

(3) There is an irrebuttable presumption that a 13 year old is incapable of rape or assault with intent to commit rape.

G. S. 7A-280 sets out the conditions under which a child under 16 years of age may be tried in Superior Court and it appears from the first sentence of G. S. 7A-280 that the entire statute pertains only to juveniles who are at least 14 years of age.

The provisions of G. S. 7A-277 and G. S. 7A-278 give the district court exclusive original jurisdiction over children under the age of 16 years.

Alluding to conclusion (3), a case in point is *State v Sam* 60 N. C. 293 (1864). In that case, the jury found that the defendant made an assault on the body of Camilla Ann Brock with an intent, forcibly and against her will, carnally to know her. The court gave judgment for the prisoner and the state appealed. The court said that "The question brought up in this case for review is whether a person of color, under 14 years of age, can be convicted of an assault with intent to commit a rape." The court held that the presumption against the commission or rape "by persons below the age of puberty (14) is irrebuttable." "This not so much on the ground of incapacity of mind or will but of physical impotency.

It will follow as a plain legal deduction from this that the person under 14 cannot commit an assault with intent to commit rape. It is a logical solecism to say that a person can intend to do what he is physically impotent to do. . . .The presumption which arises from want of age applies equally to the offense of rape and the offense of assault with the intent to commit it. Both presumptions are alike irrebuttable."

The Court in *State v Sam, supra*, called attention to the fact that the General Assembly could change these common law presumptions. The Legislature has chosen not to act since this decision of long standing.

We are aware of the case of *State v Smith*, 213, N. C. 299 (1938), in which the Court in dicta (the defendant Smith was 15 years old) stated that the lack of capacity for criminal intent of a 7 to 14 year old was rebuttable. However, this statement (213 N. C. at p. 303) was dicta and dealt with capacity for intent rather than physical capacity. It appears that *State v Sam, supra*, has not been overruled.

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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3 September 1970

Subject: Airports; State Highway Commission; Ordinances; Aircraft Landing Area, Regulation of

Requested by: Mr. John Davis, Chief Engineer, State Highway Commission

Question: Does the State Highway Commission Ordinance regulating airport construction and alteration require safe clearances between a State highway and an aircraft

landing area in accordance with State Highway Commission standards, when the landing area existed prior to December 2, 1966, the effective date of the ordinance?

Conclusion: No. The safe clearance standards adopted by the ordinance are not applicable to aircraft landing areas constructed prior to December 2, 1966, unless the landing area is subsequently altered.

The facts are indicated by a letter of August 24, 1970, from the State Highway Chief Engineer and other correcpondence attached to the letter are that an airstrip was constructed parallel to SR #1356 in Vance County in 1952 and it was extended in 1964. The Chief Engineer inquired of this office as to whether or not under the highway ordinance "we are empowered to act to provide safe clearances between highways and airports or landing strips that existed prior to December 2, 1966".

The pertinent provisions of the State Highway Commission Ordinance promulgated on December 2, 1966, pursuant to G. S. 136-18(22) are as follows:

> "1. (a) All *construction or alteration (emphasis added)* of airports or aircraft landing area, . . . shall be in conformity with standards established by the State Highway Commission, ...
>
> "(b) No such *construction or alteration (emphasis added)* shall be undertaken without having obtained a written permit from the State Highway Commission . . . and all such construction or alteration must be in accordance with said written permit.
>
> "(c) The person . . . seeking a permit for *construction or alteration (emphasis added)* of an airport or aircraft landing area shall . . . submit to the State Highway

Commission the plans and designs of the proposed construction or alteration, . . .

"3. . . . nor shall the provisions of this ordinance be construed to prohibit necessary repairs from being made to or on any airport facilities now in existence, regardless of their location."

The provisions of the ordinance are clear that it applies only in cases of construction or alteration and it specifically provides that it does not prohibit repairs to existing facilities regardless of location. The standards for safe clearances established by the ordinance have no application to an aircraft landing area constructed prior to December 2, 1966, unless it is subsequently altered.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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4 September 1970

Subject: Taxation; Ad Valorem; Exemptions; Personal Property Stored in Public Warehouses; G. S. 105-281

Requested by: Mr. D. R. Holbrook
Administrative Office
State Board of Assessment

Question: What property of a nonresident, shipped into this State and placed in a public warehouse, is not subject to assessment for ad valorem taxation in this State?

Conclusion: Personal property of a nonresident is not subject to assessment for ad

valorem taxation in this State when it is:

(a) in its original package (or fungible goods in bulk);

(b) shipped into this State by the nonresident;

(c) placed in a portion of a public warehouse, which portion is not owned or leased by the consignor or consignee of such property (or by a subsidiary of either); and

(d) for transshipment; but only if

(1) the original bill of lading specifies that the property is for transshipment, and

(2) the property is only temporarily at rest pending completion of its delivery in interstate commerce.

Chapter 1185 of the 1967 Session Laws contained the following amendment to G. S. 105-281:

> "Personal property of nonresidents of the State in their original package or fungible goods in bulk, belonging to a nonresident of the State, shipped into this State and placed in a public warehouse for the purpose of transshipment to an out-of-state or within the State destination and so designated on the original bill of lading, or personal property of residents of the State in their original package and fungible goods in

bulk, belonging to a resident of the State, placed in a public warehouse for the purpose of transshipment to an out-of-state destination and so designated on the original bill of lading, shall be, while so in the original package, or as fungible goods in bulk, in such warehouse, and they are hereby designated a special class of personal property and shall not be assessed for taxation. No portion of a premises owned or leased by a consignor or consignee, or a subsidiary of a consignor or consignee, shall be deemed to be a public warehouse within the meaning of this section despite any licensing as such. It is hereby declared to be the policy of this State to use its system of property taxation in such manner, through the classification of the aforementioned property, to encourage the development of the State of North Carolina as a distribution center. For purposes of this section and this subchapter, the term 'property, real and personal', as used in the first paragraph of this section, shall not include the property hereinabove in this paragraph so specially classified."

Analysis of that provision indicates that certain conditions must be met before property of a nonresident, shipped into North Carolina and stored in a public warehouse, may escape assessment for ad valorem taxation in North Carolina.

Such property must be:

(a) in its original package (or fungible goods in bulk, such goods being "goods, any unit of which is, from its nature or by mercantile custom, treated as the equivalent to any other unit." *Edwards v. Cleveland Mill and Power Co.* 193 N. C. 780, 138 S. E. 131 (1927).

(b) shipped into this State by the nonresident;

(c) placed in a portion of a public warehouse, which portion is not owned or leased by the consignor or consignee (or by a subsidiary of either);

(d) for transshipment to an out-of-state or within the State destination;

and the original bill of lading must state that such goods are for transshipment to an out-of-state or within the State destination.

Some question has arisen as to whether the bill of lading must state the name and address of the consignee. On its face the statute does not require that this be stated, and we are inclined to believe that this is not required. And since, if a nonresident has shipped the goods to North Carolina for transshipment, they can only be transshipped out-of-state or within the State, it would be meaningless to require a formal recital of that language on the bill of lading. It would be sufficient if the bill of lading merely recited "for transshipment" or some similar indication of the status of the goods.

It is interesting to note that a Kentucky statute, KRS 132.095, virtually identical to ours, is similarly interpreted administratively. In a letter dated 4 November 1969, the Director, Property and Inheritance Tax Division, Kentucky Department of Revenue wrote: "At first glance it would appear that the original bill of lading must designate the ultimate recipient of the goods in storage. However, it has been argued by the sponsors of this legislation that this interpretation would not be consistent with similar statutes in other states and would render the act useless. Their intent (so I am told) was to label goods for 'transshipment' in order to indicate that it was temporarily at rest and therefore subject to the special rate. The Department of Revenue has tentatively agreed to this interpretation and is administering the statute in that manner."

However, to become engrossed in the language that must appear on the original bill of lading is to miss the principal point of the law. Every indication points to a conclusion that the 1967 Act had reference to goods which were in public warehouses in this State, temporarily at rest, while completing their delivery in the course of interstate commerce. Several considerations lead to that conclusion.

1. The goods must be stored for "transshipment".

This term has a precise meaning: "The act of taking the cargo out of one ship and loading it in another". (Black's Law Dictionary, 4th Ed.) "Transshipment" and "forwarding" are interchangeable. *(Smith, Kirkpatrick & Co. v. Colombian S. S. Co.* (C. C. A. Canal Zone) 88 F. 2d 392. The act of transferring "for further transportation from one ship or conveyance to another". (Webster's Third New International Dictionary.)

Thus the goods, held at a warehouse, are merely awaiting further transportation to their destination. They are only temporarily at rest.

2. The *original* bill of lading must show that the goods are destained for further shipment (transshipment). The original bill of lading would be, we think, that bill of lading which brings the goods into this State, not a subsequent bill of lading, prepared after the goods have been stored here. This implies that an ultimate destination must be known when the goods are shipped into this State, whether or not shown on the bill of lading.

3. The title of the Act indicates that it applies specifically to goods moving in interstate commerce: "An Act To Classify Personal Property in Interstate Commerce Stored in Public Warehouses in North Carolina For Ad Valorem Tax Purposes." (c. 1185, S. L. 1967.)

That title must be considered if the meaning of the act is in doubt. The Supreme Court stated in *Sykes v. Clayton*, 274 N. C. 398, 163 S. E. 2d 775 (1968):

> "The title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law, and if it passes into law, the title thereof is consequently a legislative declaration of the tenor and object of the act . . . Consequently, when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered."

The Act's title indicates clearly that the property which is the subject of the act is property which is still in the channels of interstate commerce.

Thus, the notation of "for transshipment" on a bill of lading is not as important a consideration as the fact of the goods being en route to a destination, in interstate commerce, while they are temporarily at rest in the public warehouse.

"When there is a break in the flow of interstate transportation, the interruption may subject the goods to the jurisdiction of the state in which it occurs. A stoppage to facilitate the journey, such as holding goods on a dock awaiting the arrival of a steamer, is considered a part of the journey itself. Likewise, if the interruption is due to natural causes over which the owner has no control, the flow of transportation is deemed uninterrupted. Nor is the continuity of transportation broken, when the interruption is necessary to promote the safe or convenient transit of the goods." (P-H State & Local Tax Serv., All States Unit, ¶93668.)

But that is not to say that such goods remain in interstate commerce when the consignor stores his goods in a public warehouse pending receipt of order which he fills from that stock. "When the foreign corporation stores its goods in the state and sells those goods through its agents in the state, the sale of the goods is a transaction of the corporation's own business and, by its nature, is not within the protection of the commerce clause of the federal constitution." (P-H State & Local Tax Serv., All States Unit, ¶7528.)

Again referring to the similar Kentucky statute, we note that administratively, the same result has been achieved there:

> "We do require that the goods remain undisturbed between the dates of storage and transshipment. We do not permit 'selling' and delivery from the goods subject to this statute although there are those who have attempted to do so." (Ky. Department of Revenue letter dated 4 November 1969 to D. R. Holbrook.)

We have not overlooked the language in G. S. 105-281 to the effect

that the policy of the State is to encourage the development of the State as a distribution center. Nonetheless, we believe that the more explicit provisions of the act lead to the conclusion that encouragement at present extends to classification of property which is "in interstate commerce", not to such property whose interstate journey has come to an end. If another result had been intended, it could have been achieved by specifying, as Wisconsin has done, that goods in storage in their original package in commercial warehouses shall be considered "in transit". Wisc. Stats. §70.111(10). Or perhaps the word "distribtuion" in lieu of "transshipment" would have removed the interstate commerce aspects of the statute. However, we are faced with a construction of the statute as enacted by the Legislature, not as it might have been written.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General

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3 September 1970

Subject: Taxation; Privilege License Tax; Branch or Chain Stores; Montgomery Ward Sales Agency; G. S. 105-98

Requested by: Mr. Fred R. Harwell, Tax Collector
City of Washington

Question: Whether a store operating within a city under the name of Montgomery Ward Sales Agency, which store advertises under the name of Montgomery Ward, uses the regular Montgomery Ward mail order catalogue for making sales, accepts installment and charge account payments for Montgomery Ward Company through which company purchases are financed, and which sells only Montgomery Ward

merchandise, qualifies as a "chain store" within the meaning of G. S. 105-98 so as to permit the levy by the city of a license tax for the operation of such store within the city under the authority granted in G. S. 105-98?

Conclusion: A store operating within a city under the name of Montgomery Ward Sales Agency, which store advertises under the name of Montgomery Ward, uses the regular Montgomery Ward mail order catalogue for making sales, accepts installment and charge account payments for Montgomery Ward Company through which company purchases are financed, and which sells only Montgomery Ward merchandise, qualifies as a "chain store" within the meaning of G. S. 105-98 so as to permit the levy by the city of a license tax for the operation of such store within the city under the authority granted in G. S. 105-98.

G. S. 105-98 provides that while counties may not levy a license tax on the business taxed under this section, "cities and towns may levy a license tax not in excess of fifty dollars ($50.00) for each chain store located in such city or town." The term "chain store" as used in this section is defined to include stores operated under separate charters of incorporation if there is common ownership of a majority of stock in such companies, or a similarity of name of such companies, or if such companies have the benefit of group purchase of merchandise or of common management. This section further defines the term "chain store" to apply to any group of stores where a majority interest is owned by an individual or partnership.

Furthermore, the subject of taxation under this section, "a branch or chain store operator", is defined as "every person, firm or corporation engaged in the business of operating or maintaining in this State, under the same general management, supervision, or

ownership, two or more stores . . . where goods or merchandise are sold or offered for sale, . . . who or which controls . . . the manner in which any such store or stores are operated, or the kinds, character, or brands of merchandise which are sold therein."

These definitions would appear broad enough to include a store operating under the name "Montgomery Ward Sales Agency" which advertises under the name of "Montgomery Ward", uses the regular Montgomery Ward mail order catalogue for making sales, employs Montgomery Ward installment sale financing and sells only Montgomery Ward merchandise, and a city or town may levy, under the authority granted in G. S. 105-98 and within the amount limitation specified, a license tax on the operation of any such store within its corporate limits.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.
Assistant Attorney General

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15 July 1970

Subject: Courts; Clerk of Superior Court; Mental Examination; Authority to Order Physicians to Examine Allegedly Mentally Ill Person

Requested by: Honorable J. C. Taylor
Clerk of Superior Court of Halifax County

Questions: (1) Does G. S. 122-62 require the clerk of court to specify by name the two physicians required to examine the alleged mentally ill person?

(2) Does G. S. 122-62 empower the clerk of court to order physicians in the county to perform the examination?

Conclusion: Article 7 or Chapter 122, G. S. 122-60 through G. S. 122-65.9, requires the clerk of court to act in a judicial capacity. G. S. 122-62 requires the clerk of court to name the two physicians who are to perform the examination of the alleged mentally ill person in the order for examination. This section clothes the clerk with the authority to order the physicians to perform the examination, and, if necessary, to enforce this order by citing for contempt.

n a telephone conversation on June 29, 1970 the Honorable J. C. Taylor, Clerk of Superior Court of Halifax County, posed the wo questions as stated above.

Article 7 of Chapter 122 is titled "Judicial Hospitalization." This article is comprised of § § 122-60 through 122-65.9. The article ets out in detail the procedure to be followed in order to hospitalize a mentally ill person against his will. G. S. 122-63 requires the clerk of court to hold a hearing on the question of the need for hospitalization, receive evidence, and make findings of fact and conclusions of law based there on. The entire article clearly manifests the intention that the clerk of court shall act in a judicial capacity in proceedings brought pursuant to this article. See *Bailey v. McGill*, 247 N. C. 286, at p. 291.

G. S. 122-62, in pertinent part, provides as follows: "when an affidavit and request for examination of an alleged mentally ill person. . .has been made. . .(the clerk) shall *direct* two qualified physicians. . . to examine the alleged mentally ill person."

The verb "direct" is defined by Black's Law Dictionay, Fourth Edition, as meaning "to order; to command." It is obvious that the legislature intended the word to have at least this force and effect for it would be a vain thing for the statute to require the clerk to perform a judicial function but not clothe him with the authority to issue orders necessary to its accomplishment.

G. S. 122-62 gives the clerk this needed authority. It imposes a

duty upon physicians to serve as witnesses in such proceedings. *Bailey v. McGill, supra*, at p. 292. If a physician refuses to perform this duty the clerk of court can enforce his order by the use of his contempt powers.

As a practical matter the clerk of court should arrange in advance for the services of two physicians willing to perform this duty and thus avoid the necessity of a direct order requiring the service. However, in the event that such arrangements cannot be made, the clerk clearly has the authority to order physicians to make the examination.

Robert Morgan, Attorney General
L. Phillip Covington,
Staff Attorney

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14 September 1970

Subject: Courts, Solicitors; Setting Cases for Trial on Criminal Docket

Requested by: Mr. Archie Taylor, Solicitor
4th Solicitorial District

Question: Does the presiding judge or the solicitor have the duty and authority to place on the criminal calendar the cases to be called for trial?

Conclusion: The solicitor has the authority and discretion to decide which cases shall be placed on the trial calendar.

The Solicitor is a constitutional officer, Article IV, Section 16, North Carolina Constitution, and responsible for the prosecution of all criminal actions within the courts of his district (G. S. 7A-61). The solicitor, by virtue of G. S. 7A-49.3, must file with the clerk of superior court, one week before the session, a calendar of the

cases he intends to call for trial at that session. It is clear from the language of G. S. 7A-49.3 that what cases shall be placed upon thr trial calendar is within the authority of the solicitor.

As stated in *State v. Furmage*, 250 N. C. at 622, a solicitor, as a public officer and as an officer of the court, is vested with important discretionary powers. It is his duty to present all available evidence and to prosecute persons charged with crimes. If prior to prosecution he finds the evidence insufficient to support conviction, he may enter a nolle prosequi or nolle prosequi with leave.

Manifestly, a solicitor must determine which cases should be calendared for trial since he could not prosecute unless the evidence was available, the witnesses, defendant and attorneys were available, and other factors as may be necessary to go forward with the trial.

Robert Morgan, Attorney General
James R. Bullock,
Deputy Attorney General

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14 September 1970

Subject: Motor Vehicles; Liens; Wrecker Fees Not Included in Mechanic's Lien.

Requested by: Mr. R. B. Parker, Assistant Director
License and Theft Division
Department of Motor Vehicles

Question: G. S. 44A-2 gives a preferred possessory lien on personal property to "any person who alters, repairs, services, treats or improves personal property in the ordinary couse of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property . . .". By virtue of this statute, does an individual who tows a motor vehicle to a place of storage acquire a lien upon such motor vehicle

for the wrecker fee involved?

Conclusion: G. S. 44A-2 does not create a lien in favor of an individual who tows a motor vehicle to a place of storage.

Clearly the vehicle is not "altered", "repaired" or "improved".

Webster's Seventh New Collegiate Dictionary (1969) equates the word "treat" with "improve" or "alter". Thus, it does not appear that this term would include the mere towing of a motor vehicle.

The only remaining term employed by the statute is "services". In *Humble Oil and Refining v. State*, 158 S. W. 2d 336, (Texas, 1942) with respect to the word "service", the Court said:

> "The term as applied to the service station business has acquired such a general and commonly understood meaning as to require the courts to take judicial notice of it."

In this common usage, the term "service" when applied to a motor vehicle is considered to require that some work be performed on the vehicle or its component parts that has a beneficial effect on its maintenance or operation.

The mechanices lien grows out of the old common law artisans lien. In Lee, *Liens on Personal Property*, 44 N. C. L. R. 322, 327, it is noted that such liens did not arise unless the work was done at the request of the owner or one in privity with him. Very often in situations described in the question, there is no request by the owner or one in privity with him that the towing be performed.

The Attorney General understands the plight of garage and wrecker operators in the disposition of wrecked vehicles but upon the state of the existing law is constrained to reach the conclusion expressed above.

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

7 July 1970

ubject: Public Officers & Employees; Salaries; County Elections Board Executive Secretary; Authority of County Commissioners in Budget Appropriations.

equested by: Mr. H. Clyde Ballard, Jr., Chairman
Henderson County Board of Elections

uestion: When a county board of elections has filed its budget statement pursuant to G. S. 153-117, and recommended a certain salary for its executive secretary, may the board of county commissioners, in making its appropriations under G. S. 153-120, appropriate a lesser amount than recommended by the board of elections?

onclusion: Yes. Although G. S. 163-32 and G. S. 163-67.1 authorize the county board of elections to fix the salary of the executive secretary, such salary must be within the budget appropriations as fixed by the county commissioners in the budget resolution.

. S. 163-32 provides:

> "In all counties the board of elections shall pay its clerk, assistant clerks, and other employees such compensation as it shall fix within budget appropriations. Counties which adopt full-time and permanent registration shall have authority to pay executive secretaries and special registration commissioners whatever compensation they may fix within budget appropriations."

. S. 163-67.1 provides:

"The county boards of elections, whether operating under the provisions of G. S. 163-67(a) or (b) shall have authority to employ an executive secretary who shall be paid such compensation as recommended by the county board of elections and approved by the respective boards of county commissioners."

G. S. 153-120 provides:

"The appropriations shall be made in such sums as the board may deem sufficient and proper, whether greater or less then the recommendations of the budget estimate, and the appropriation or appropriations for each department, institution, or agency shall be made in such detail as the board deems advisable: . . ."

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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21 July 1970

Subject: Taxation; Ad Valorem; Exemption; Leased Tangible Personal Property Owne by Bank; G. S. 105-228.13

Requested by: Mr. Thomas C. Posey
Lenoir County Tax Supervisor

Question: Whether tangible personal property owne by a bank and leased by the bank to mortgage company is exempt fro personal property ad valorem tax und G. S. 105-228.13?

onclusion: Tangible personal property owned by a bank and leased by the bank to a mortgage company is exempt from personal property ad valorem tax under G. S. 105-228.13 notwithstanding the use of such property by the mortgage company.

ursuant to the provisions of G. S. 105-304, the general rule is that ersonal property shall be listed for taxation in the name of the wner thereof, and no exception to this rule is made with respect leased property. Although leased property may be used xclusively by the lessee, such property should still be listed and xed in accordance with its ownership under this general rule, unless is exempted from tax under other provision of the law. . S. 105-304 provides in part as follows:

> "In general, personal property shall be listed in the name of the owner thereof on the day as of which property is assessed; and it shall be the duty of the owner to list the same."

hile there is no specific exemption from taxation of property wned by banks within the Machinery Act, G. S. 105-228.13 ovides that the excise tax, which is levied under G. S. 105-228.12 every bank located and doing business within this State, "shall in lieu of . . . taxes levied upon tangible personal property by cal taxing jurisdictions." Therefore, any tangible personal property hich is owned by any bank subject to such excise tax is not subject ad valorem personal property tax.

Robert Morgan, Attorney General
I. Beverly Lake, Jr..
Assistant Attorney General

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July 1970

ubject: Taxation; Ad Valorem; Listing Property; Person in Whose Name Personal Property Should Be

Listed; Floor Plan Financing Arrangement; G. S
105-304

Requested by: Mr. Bonner R. Lee
Hyde County Accountant

Question: Whether personal property in the nature of farn machinery and in the possession of a local deale in such machinery should be lised for taxatio in the name of such dealer when such propert is in the dealer's possession under a floor pla financing arrangement whereby a bank o financing institution has made a loan or extende credit to such dealer through payment of th manufacturfor each item of such machinery, sucl loan to be secured by and repaid upon th dealer's sale of said machinery?

Conclusion: Personal property in the nature of farn machinery and in the possession of a local deale in such machinery should be listed for taxatio in the name of such dealer when such propert is in the dealer's possession under a floor pla financing arrangement whereby a bank o financing institution has made a loan or extende credit to such dealer through payment of th manufacturer for each item of such machiner and such loan is to be secured by and repaid upo the dealer's sale of said machinery.

A transaction through which a local dealer takes possession of certai machinery for sale under a floor plan financing arrangement, unde which arrangement a bank or financing institution makes a loan o extends credit to such dealer through payment of the manufacture for such machinery and such loan is secured by and is to be repai upon the dealer's sale of said machinery, would appear to be transaction which would fall within the provisions of subsection (a of G. S. 105-304 which reads as follows:

> "In general, personal property shall be listed in the name of the owner thereof on the day as of which

property is assessed; and it shall be the duty of the owner to list the same. The owner of the equity of redemption in personal property subject to a chattel mortgage shall be considered the owner of the property; and the vendee of personal property under a conditional bill of sale, or under any other sale contract by virtue of which title to the property is retained in the vendor as security for the payment of the purchase price, shall be considered the owner of the property, provided he has possession of such property or the right to use the same."

nce the local dealer has the possession of the property or the ght to use it under this financing arrangement, if not the legal tle, such property should be listed for taxation in the name of ch dealer.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General

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2 July 1970

ubject: Taxation; Inheritance Tax; Safety Deposit Box, Access to; Duty of Clerk of Court

equested by: Honorable Sion H. Kelly
Clerk of Superior Court of Lee County

uestion: May a clerk of superior court appoint an officer or employee of a bank to represent him at the opening of a safety deposit box of a deceased person at the bank under G. S. 105-24?

onclusion: A clerk of superior court may not properly appoint an officer or employee of a bank to act as his representative at the opening of a safety deposit box of a deceased person at the bank under G. S. 105-24.

G. S. 105-24 provides that every bank must require the presenc of "the clerk of the superior court of the county in which suc lock box is located" as a condition precedent to the opening o such a box by the executor, administrator or personal representativ of such deceased person. This statute then further provides a follows:

> "It shall be the duty of the clerk of the superior court, or his representative, *in the presence of an officer or representative of the safe deposit company, trust company, corporation, bank*, . . . to make an inventory of the contents of any such lock box and to furnish a copy of such inventory to the Commissioner of Revenue, to the executor, administrator, personal representative, or cotenant of the decedent, and a copy to the safe deposit company, trust company, corporation, bank . . . having possession of such lock box". *(Emphasis added.)*

It thus seems clear that this statute requires, upon the opening o a safety deposit box, not only the presence of the clerk or hi representative but also the presence of an officer or representativ of the bank, and in view of the different duties, responsibilities an interests involved, as stipulated in this statute, it would seem t be within the meaning and purpose of this statute, and in the bes interest of the Clerk of Court, that the representative of the Clerl and the representative of the bank should not be the same perso or a person having more than one duty or interest to represent

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General

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24 July 1970

Subject: State Departments, Institutions & Agencies Medical Care Commission; Authority to Classify

Hospital Emergency Services.

Requested by: Mr. William F. Henderson,
Executive Secretary
The North Carolina Medical Care Commission

Question: Does the North Carolina Medical Care Commission have authority to classify hospital emergency services in accordance with types or classifications of emergency service available, and to require hospitals to maintain the standards of emergency care service of the type or classification which such hospital selects for itself?

Conclusion: Yes, the North Carolina Medical Care Commission does have authority to classify hospital emergency services in accordance with types or classifications of emergency service available, and to require hospitals to maintain the standards of emergency care service of the type or classification which such hospital selects for itself.

The North Carolina Medical Care Commission is considering classification and defining hospital emergency services according to the types and quality of service which may be available, perhaps in five types such as:

Type I - Comprehensive Emergency Center
Type II - General Emergency Center
Type III - Intermediate Emergency Department
Type IV - Limited Service Emergency Unit
Type V - First Aid Emergency Unit

Each type would be fully described with respect to the facilities, staffing, and scope of care required with respect to each type of service. Once the classifications were adopted, each hospital would be expected to designate the type of emergency services it proposed to render. The furnishing of the type of emergency service so selected would be tied in with the licensing of the hospital under the Hospital Licensing Act, and thereafter each hospital would be

required to furnish and maintain the standards of the type o emergency service which it elected to render.

The question is whether the North Carolina Medical Ca Commission has authority to do this under the provisions of th Hospital Licensing Act. G. S. 131-126.2 provides as follows:

> "§ 131-126.2. *Purpose.* - The purpose of this article is to provide for the development, establishment and enforcement of basic standards:
>
> "(1) For the care and treatment of individuals in hospitals and
>
> "(2) For the construction, maintenance and operation of such hospitals, which, in the light of existing knowledge, will ensure safe and adequate treatment of such individuals in hospitals, provided, that nothing in this article shall be construed as repealing any of the provisions of article 27 of chapter 130 of the General Statutes of North Carolina."

G. S. 131-126.3 provides in part as follows:

> "After July 1st 1947, no person or governmental unit, acting severally or jointly with any other person or governmental unit shall establish, conduct or maintain a hospital in this State without a license."

The above statutory provisions constitute an adequate grant o authority from the General Assembly for the North Carolina Medic Care Commission to carry out such a program with respect t hospital emergency services as is described above.

Robert Morgan, Attorney General
Harry W. McGalliard,
Deputy Attorney General

August 1970

ıbject: State Departments, Institutions & Agencies; Purchase and Contracts; Necessity of Public Bidding on Contract for Purchase of Computers.

equested by: Mr. R. D. McMillan, Jr.
State Purchasing Officer
Purchase and Contract Division
Department of Administration

uestion: Can the Purchase and Contract Division of the Department of Administration purchase a computer for a State agency or State institution, which is now being leased by that agency or institution, without soliciting sealed bids as prescribed by G. S. 143-52?

nswer: No. The Purchase and Contract Division cannot dispense with the competitive bidding requirements for the purchase of equipment and purchase a computer now being leased by the State agency or institution in the absence of showing that competition would be impossible or unavailable.

he facts as indicated by Mr. R. D. McMillan, Jr. are that several tate agencies and institutions are presently leasing 1130 IBM ɔmputers. IBM has offered to sell these computers to several of ıe State institutions now leasing them. Officials at the State stitutions consider the offers made by IBM a very good purchase rice and have requested the State Purchasing Officer to purchase ıe computers without competitive bidding.

y weight of authority, a statutory requirement for competitive bids ɔnstitutes a jurisdictional prerequisite to the exercise of the power f a private corporation to enter into a contract. *Teer v. State ighway Commission*, 265 N. C. 1; *Teer v. State Highway ommission*, 4 N. C. App. 126. G. S. 143-49 provides that the irector shall have the power and authority and it shall be his duty, ıbject to the provisions of this article, to canvass all sources of

supply and to contract for the purchase of all supplies, materials and equipment required by State government, or any of its departments, institutions or agencies under competitive bidding in the manner hereinafter provided for. G. S. 143-52 provides that sealed bids shall be solicited and except as otherwise provided by this article, all contracts for the purchase of supplies, materials or equipment made under the provisions of this article *shall whenever possible* be based on competitive bids and shall be awarded to the lowest responsible bidder.

Statutes requiring competitive bidding should not be given such construction as to defeat their purpose or impede usual or regular progress of public business and public improvements, and their requirements may be dispensed with when such advertisement will not result in competitive bidding for the work. 43 Am. Jur., Public Works and Contracts, sec. 31. The purpose of statutes requiring competitive bidding is to prevent favoritism, corruption, fraud and imposition in the awarding of public contracts by giving notice to respective bidders and thus assuring competition which in turn guarantees fair play and reasonable prices in contracts involving expenditures of substantial amounts of public money. It has application to contracts for the purchase of materials and supplies where the bidders are free to name the price for which they are willing to furnish the thing. It does not apply where the competition would be impossible or unavailable or as to a monopoly. *Mullen v. Louisburg*, 225 N. C. 53 at page 59; 43 Am. Jur., Public Works and Contracts, secs. 26 and 31. The Legislature recognizes this exception as it provided in G. S. 136-52 that all contracts for the purchase of equipment *shall whenever possible* be based upon competitive bids.

However, a governmental agency attempting to come within an exception to the competitive bidding requirements has the burden of showing that it comes within the exception. *Raynor v. Commissioners of Louisburg*, 220 N. C. 348. The facts as indicated here do not show the absence of competition in the sale of the computers. Therefore, I am of the opinion that the competitive bidding requirements of G. S. 143-52 cannot be dispensed with.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

August 1970

ubject: ABC Act; Beer and Wine; Permit Revocation Hearings; Question of Suitability of Person or Place to Hold a Permit

Requested by: Mr. D. L. Pickard,
Assistant Director-Hearing Officer,
State Board of Alcoholic Control

Question: In a hearing into the suspension or revocation of a wine or malt beverage permit where one of the violations charged is the unsuitability of the permit holder to have a permit pursuant to the provisons of G. S. 18-136 and where there is evidence that that permit holder also holds a wine or malt beverage permit for another location, is it proper to admit evidence of a history of violations at premises other than those for which the permit may be suspended or revoked?

Conclusion: It is proper in a hearing into the suspension or revocation of a wine or malt beverage permit where one of the violations charged is the unsuitability of the permit holder to have a permit pursuant to the provisions of G. S. 18-136 and where there is evidence that that permit holder also holds a wine or malt beverage permit for another location to admit evidence of a history of violations at premises other than those for which the permit may be suspended or revoked.

G. S. 18-136 provides that the State Board of Alcoholic Control may refuse to issue a new permit or may suspend or revoke any permit issued by it if in the discretion of the Board "it is of the opinion that the applicant or permittee is not a suitable person to

hold such permit or that the place occupied by the applicant or permittee is not a suitable place." Among those charges of violations of the ABC laws and the regulations of the State Board of Alcoholic Control, charges of unsuitable person or place are very often included. The inquiry is whether it would be competent to place in a record a history of violations of some other location where the applicant or permittee has held or currently holds other beer or wine permits.

We are of the opinion that the suitability of the applicant to hold a permit at the subject premises would logically extend to his suitability to hold any wine or malt beverage permit and while such other permit if it still is valid could not be revoked or suspended pursuant to a hearing dealing with some other premises, the evidence that the applicant or permittee was unsuitable to run some other premises would also have some logical and legal relevancy to his suitability to run the subject premises.

Any history of violations on other premises which would be concerned with the suitability of those other premises, however, such as violation of the health laws or other matters concerned strictly with those premises would not be relevant to a hearing on the subject premises, however, and evidence as to violations of that nature should be excluded.

Robert Morgan, Attorney General
(Mrs.) Christine Y. Denson,
Staff Attorney

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15 September 1970

Subject: Licenses & Licensing; Hearing Aid Dealers and Fitters Board; Authority to Withhold License Under Grandfather Clause

Requested by: Miss Frances S. Dickinson,
Secretary-Treasurer
North Carolina State Hearing Aid Dealers and Fitters Board

Questions: (1) May the North Carolina State Hearing Aid Dealers and Fitters Board properly withhold a license from a person applying under the grandfather clause (G. S. 93D-7) on the grounds that the person does not have the proper machinery or the necessary certification for it in his place of business?

(2) May the Board withhold a license applied for under the provisions of G. S. 93D-8 for failure of the applicant to have such machinery?

Conclusions: (1) The North Carolina State Hearing Aid Dealers and Fitters Board has no legal authority to withhold a license from a person applying under the grandfather clause (G. S. 93D-7) on the grounds that the person does not have the proper machinery or the necessary certification for it in his place of business.

(2) The North Carolina State Hearing Aid Dealers and Fitters Board has no legal authority to withhold a license applied for under the provisions of G. S. 93D-8 for failure of the applicant to have such machinery.

With regard to persons applying for a hearing aid dealers and fitters license under the provisions of Chapter 93D of the General Statutes, an inquiry was made of this Office as to whether the Board's rule requiring the installation of an audiometer on the licensed premises and the submission of a certificate that the audiometer is in good working order and the submission of a "calibration slip" is a proper requirement before a permit is issued under the grandfather clause (G S. 93D-7). G. S. 93D-7 provides:

"§ 93D-7. *Persons engaged in the fitting and selling*

of hearing aids before the passage of this chapter. - Every person engaged in fitting and selling hearing aids upon the effective date of this chapter shall be issued a license by the Board, upon presentation of evidence satisfactory to the Board that he is a person of good moral character, is twenty-one years of age or older, and has been engaged in fitting and selling hearing aids in this State for at least two years prior to the effective date of this chapter, provided such person pays a fee of fifty ($50.00) dollars for the issuance of a license by the Board; and provided he makes application to the Board for such licnese within sixty days after the effective date of this chapter. Upon payment of an additional five dollars ($5.00), a license certificate shall be issued."

Clearly the only requirements which the Board may properly make for issuance of a license are that the person be of good moral character, be at least 21, have been engaged in fitting and selling hearing aids in North Carolina for at least two years prior to the effective date of the section and have paid the license fee of $50.00. The application must be made to the Board for a license within sixty days of the effective date, but since the Board was late in being organized, this sixty-day limitation has no practical effect. The statute provides that the person so qualifying "*shall* be issued a license by the Board" (*emphasis added*) and the Board clearly has no discretion in this matter. Since requirement of the proper machinery is not one of the statutory qualifications, it may not properly be a ground for refusal to issue the permit.

The same arguments would apply in case of a person not qualifying for a license under the grandfather clause but making application under the provisions of G. S. 93D-5 with the further qualification of examination in G. S. 93D-8. Compliance with the rules of the Board are not made a prerequisite for issuance and so any requirements regarding the audiometer would be inapplicable.

Of course, the Board has rule-making and regulatory authority (G. S. 93D-3) and may suspend or revoke a license for failure to comply with those rules (G. S. 93D-13).

Robert Morgan, Attorney General
(Mrs.) Christine Y. Denson
Staff Attorney

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23 September 1970

Subject: Administration of Estates; Ancillary Administration; Money Held in Trust in North Carolina Banks for Deceased Beneficiary; Release to Trustee

Requested by: Honorable H. L. Lewis, Jr.
Clerk of Superior Court
Pitt County

Questions: (1) May the clerk of superior court appoint an ancillary administrator in the case of an out-of-state resident who had funds held in trust in a North Carolina bank?

(2) Is complete administration of the estate concerning North Carolina assets necessary in North Carolina if New York has already probated the estate as to assets located there?

(3) What is the authority or power of the clerk or bank regarding the funds held by the bank for the decedent in North Carolina?

Conclusions: (1) The clerk of superior court has power to appoint an ancillary administrator in the case of an out-of-state resident who had funds held in trust in a North Carolina bank.

(2) Complete administration of the estate

concerning North Carolina assets is not necessary if New York has already probated the estate as to assets located there.

(3) The clerk may approve the handing over of funds to the ancillary administrator and the bank should pay such funds, deducting any intangibles tax which the bank has paid on that account, to the ancillary administrator. It would be the responsibility of the administrator to see that any inheritance or federal estate taxes are paid.

The inquiry of August 25 indicates that money is held in a local bank in North Carolina in trust in the name of X for Y who is now deceased. The facts indicate that Y was a New York resident at her death and that probate has at least commenced and perhaps been concluded in the State of New York on Y's estate. The question is whether the money should be released to the trustee, X, who is making claim to the funds or whether an ancillary administrator should be appointed in this State.

The inquiry does not indicate the nature of the trust agreement which X and Y or some other person might have completed with the bank and so we are unable to determine definitively whether X might have a valid claim to the funds at this point or whether they should go to Y's estate. Assuming, however, that the agreement would provide that the funds would go to Y's estate, this opinion answers the remaining questions regarding the duties of the clerk and the bank. We emphasize that the assumption that the funds go into Y's estate is a critical assumption and if the trust agreement would indicate to the contrary, which would be a matter for the bank to decide, then the points made in this opinion would not be valid for these particular funds.

It is clear that the clerk of superior court in North Carolina has jurisdiction of the estate. Even if the deceased was a New York resident, G. S. 28-1(3) provides that the clerk will have power to appoint an administrator in the case where

> "the decedent, not being domiciled in this State, died out of the State, leaving assets in the county of such clerk, or assets of such decedent thereafter come into the county of such clerk."

See also *In Re Will of Brauff*, 247 N. C. 92, 100 S. E. 2d, 254 (1957).

The clerk therefore has the authority to appoint an ancillary administrator in this estate or to recognize the executor of the estate in New York providing the requirements regarding appointment of a local process agent are complied with.

Pursuant to the provisions of G. S. 31-27, the will of the deceased, if one has been probated in the State of New York, may be accepted by the clerk for probate in this State when the requirements of G. S. 31-27 are fully met.

Any intangibles taxes which may have become due on the bank account of the deceased have presumably been paid by the bank as they became due and would be a proper deduction against the account before such sums are turned over to the ancillary administrator. In North Carolina, of course, the administrator would be responsible for payment of such inheritance taxes as might be due on the estate.

Robert Morgan, Attorney General
(Mrs.) Christine Y. Denson,
Staff Attorney

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12 August 1970

Subject: Taxation; Ad Valorem; Exemptions; Farm Produce; Original Producer; G. S. 105-297(12)

Requested by: Mr. Walter J. Cashwell, Jr.
Scotland County Attorney

Question: Is seed company an "original producer" under agreement with farmers to produce seed wheat and barley which, if acceptable, will be bought by seed company, so that its inventory of seed thus obtained will be exempt from ad valorem taxation under G. S. 105-297(12).

Conclusion: Seed company is not "original producer" under agreement with farmers to produce seed wheat and barley which, if acceptable, will be bought by seed company and its inventory thus obtained will not be exempt from ad valorem taxation under G. S. 105-297(12).

A seed company obtains seed wheat and barley from farmers, pursuant to the following agreement:

"*SEED COMPANY WILL:*

1. Furnish planting seed at the rate of _____ per acre for _____ acres.
2. Pay certification fees.
3. Pay 15 cents premium per bushel for grain meeting certification standards, less dockage, delivered to its plant.
4. Price per bushel is for grain at 13.5% moisture or lower; standard wheat discounts will be applied to grain above 13.5% moisture.

GROWER WILL:

1. Pick up planting seed at Seed Company warehouse in Laurinburg.
2. Exercise due care to avoid mixtures by thoroughly cleaning grain drill, combine, and trucks or trailers used for hauling seed crop.
3. Do necessary roguing for certification.
4. Spray fields with 2,4-D to control weeds.
5. Repay planting seed at the rate of

1 1/4 bushels of raw seed for each bushel of planting seed received.

6. Sell the entire production of this crop to Seed Company.

7. Select date for settlement of price from date of delivery to 30 days later, using either quoted local market or the grain price published in the Raleigh News and Observer, less freight to quoted market. . . .

PROVISO:

If the crop does not pass certification, seed may be disposed of as the grower wishes. If failure to pass certification is clearly due to negligence on the part of the grower, Seed Company will be reimbursed for planting seed furnished at the rate of _____ per bushel. If failure to pass certification results from any cause not attributable to negligence on the part of the grower, no compensation for planting seed will be due Seed Company."

After the seed has been produced, and after it has been sold to the seed company, is it then exempt from ad valorem taxation under G. S. 105-297(12)?

G. S. 105-297(12) provides an exemption for:

> "All cotton or other farm produce owned by the original producer, or held by the original producer in any public warehouse and represented by warehouse receipts, or held by the original producer for any cooperative marketing or growers association, shall be exempt from taxation for the year following the year in which grown, but not for any year thereafter." G. S. 105-297(12)

Thus it is necessary to determine whether the seed company is the "original producer". If it is, and either (1) owns the seed or (2) holds it in a public warehouse, as evidenced by warehouse receipts or (3) holds it for a cooperative marketing or growers association,

then such seed will be exempt. If it is not the "original producer", then the exemption is unavailable.

Under the agreement, the farmer either "repays" the planting seed, at the rate of 1 1/4 bushels for every bushel he received to plant, or, if the crop is not sold to the seed company due to negligence in the growing of it, he pays the seed company at a specified rate per bushel. In addition, the agreement clearly provides that only if the crop meets certain standards must he "*sell* the entire production of this crop to seed company." If it fails to meet these standards, "seed may be disposed of as the grower wishes." In effect, the farmer buys the seed from the seed company, and sells the crop produced therefrom to the seed company, and no title, or any other choate interest can be said to be in the seed company until that sale takes place. The seed company would, it seems to us, stand in the same relation to the production of the crop as any other purchaser of farm commodities. That is, it has not "produced" the crop except in the sense that the crop was produced by the farmer for sale, and he in fact sold it, to the seed company.

"Producer" is commonly used to denote the person who raises agricultural products and puts them in condition for the market. *Tennessee Burley Tobacco Growers Association v. Commodity Credit Corp.* (C. A. Tenn.) 350 F. 2d 34, 41.

See also *Parks v. Federal Crop Ins. Corp.* (C. A. Ind.) 416 F 2d 833, 837, where it was held that although farmers made contracts with an agricultural association whereby the association would furnish farmers with seed, a man to supervise planting, and labor, and also agreed to compensate the farmers at the rate of $100 per acre plus a premium of $1.25 per bushel in excess of 20 bushels of seed corn per acre, the farmers themselves were the "producers".

Similarly, we conclude that the farmers producing the crop, not the seed company, were the "original producers." The exemption provided in G. S. 105-297(12) is not available to the seed company.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General

26 August 1970

Subject: Business & Commerce; Professional Corporation Act; Applicability to Domestic and Foreign Corporations

Requested by: Mr. Joseph G. Maddrey,
Corporations Attorney
Office of Secretary of State

Questions:

1. Can one or more persons who render professional services as defined in G. S. 55B-2(6) incorporate under Chapter 55 (Business Corporation Act), or is it mandatory that they incorporate under Chapter 55B (Professional Corporation Act)?

2. In light of G. S. 89-13, as amended, would all corporations which were incorporated prior to June 5, 1969, and engaging in the practice of engineering or land surveying, automatically come within the provisions of Chapter 55B on January 1, 1970, without complying with G. S. 55B-15?

3. Does G. S. 89-13 make it mandatory for corporations described in Question 2 to file an amendment under G. S. 55B-15?

4. Would one of the corporations described in Question 2 performing a corporate action, i.e., selling corporate stock, be governed by the provisions of Chapter 55B in view of G. S. 89-13?

5. Would all corporations which were

permitted by law prior to June 5, 1969, to render professional services as defined in G. S. 55B-2(6) automatically come under the provisions of Chapter 55B on January 1, 1970, or would they still maintain the option to do so by choice, i.e., amendment to its charter?

6. If an individual, firm or partnership located in North Carolina and performing professional services as defined in G. S. 55B-2(6) should incorporate under the Business Corporation Act of another state, could it then domesticate in North Carolina under Chapter 55 or must it domesticate under the provisions of Chapter 55B?

7. If the corporation described in Question 6 is allowed to domesticate in North Carolina under Chapter 55, is it required that the individuals within the corporation performing professional services as defined in G. S. 55B-2(6) be licensed by the appropriate licensing board in North Carolina?

8. Can a foreign corporation performing services as defined in G. S. 55B-2(6) but incorporated under its state business corporation act, domesticate in North Carolina under our Business Corporation Act, or must it domesticate under Chapter 55B?

CONCLUSIONS: 1. G. S. 55B-3 provides: "The

Business Corporation Act shall be applicable to such professional corporations, including their organization, and professional corporations shall enjoy the powers and privileges and shall be subject to the duties, restrictions and liabilities of other corporations, except insofar as the same may be limited or enlarged by this chapter. If any provision of this chapter conflicts with the provisions of the Business Corporation Act, the provisions of this chapter shall prevail."

G. S. 55-3(6) provides: "The provisions of this chapter shall apply to every corporation for profit, and, so far as appropriate, to every corporation not for profit having a capital stock, now existing or hereafter formed, and to the outstanding and future securities thereof, unless the corporation is expressly excepted from the operation hereof *or unless there is other specific statutory provision particularly applicable to the corporation* or inconsistent with some provisions of this chapter, in which case that other provision prevails." (*Emphasis added.*)

Chapter 55B makes requirements of the incorporators in addition to those contained in Chapter 55. See G. S. 55B-4 which provides, *inter alia*, that at least one incorporator must be a licensee, that all shares of stock must be owned by a licensee or licensees, that at least one director

and one officer shall be a licensee and that the articles of incorporation designate the personal services to be performed by the corporation.

See also G. S. 55B-13 which gives greater protection to the public than does Chapter 55 with respect to the activities of a professional corporation. From the foregoing provisions of Chapter 55B, it is clear that the legislative intent is that Chapter 55B is the sole manner in which a person or persons performing a professional service could incorporate.

"The intent of the legislature controls the interpretation of a statute." 7 Strong, N. C. Index 2d, Statutes, sec. 5.

2. G. S. 89-13 provides: "A corporation or partnership may engage in the practice of engineering or land surveying in this State: Provided, however, the person or persons connected with such corporation or partnership in charge of the designing or supervision which constitutes such practice is or are registered as herein required of professional engineers and land surveyors. The same exemptions shall apply to corporations and partnerships as apply to individuals under this chapter; *provided further, that all corporations hereunder shall be subject to the provisions of chapter 55B of the General Statutes of North Carolina." (Emphasis added.)*

The underlined portion was enacted in 1969 as Section 28 of Chapter 718 of the Session Laws (The Professional Corporation Act).

G. S. 55B-15 provides: "*This chapter shall not apply to any corporation which prior to June 5, 1969, was permitted by law to render professional services as herein defined;* provided, however, any such corporation rendering 'professional service' as defined in §55B-2(6) may be brought within the provisions of this chapter by the filing of an amendment to its articles of incorporation declaring that its shareholders have elected to bring the corporation within the provisions of this chapter and to make the same conform to all of the provisions of this chapter." (*Emphasis added.*)

Based on these two statues, a corporation engaged in the practice of engineering or land surveying prior to June 5, 1969, does not automatically come under the provisions of Chapter 55B. However, such a corporation may elect to come under Chapter 55B by virtue of the proviso in G. S. 55B-15.

3. No. While G. S. 89-13, as amended by Chapter 718 of the 1969 Session Laws, and quoted above, appears at first to be in conflict with G. S. 55B-15, also quoted above, it is possible to give both statutes effect by applying the proviso to the second sentence of G. S. 89-13 to

only those corporations created on or *after* June 5, 1969. Statutes with conflicting provisions are construed by the courts to give effect to legislative intent. See 7 Strong, N. C. Index 2d, Statutes, Section 5.

4. As to corporations engaged in the practicing of engineering or land surveying prior to June 5, 1969, and not electing to come under Chapter 55B, by virtue of the provisions of G. S. 55B-15, all corporate action will be governed by the provisions of Chapter 55.

5. Under the provisions of G. S. 55B-15, quoted above, corporations engaged in those professions' services listed in G. S. 55B-2(6) before June 5, 1969, do not automatically come under the provisions of Chapter 55B.

6. The corporation must domesticate under Chapter 55B. If one or more individuals, residents of North Carolina, and practicing a "professional service" as defined in G. S. 55B-2(6), were to incorporate in another state and then attempt to secure permission to practice in North Carolina under the provisions of Chapter 55, this would constitute a violation of the *spirit* of the Professional Corporation Act, and such permission should not be granted.

7. In view of the answer to Question

6, an answer to Question 7 is not required.

8. The corporation must domesticate under Chapter 55B. While it is true that the Professional Corporation Act, Chapter 55B, makes no provision for the domestication in North Carolina of a foreign corporation, nowhere in the Act is there any indication that the General Assembly intended to give foreign professional corporations the right to practice in North Carolina without complying with the Professional Corporation Act. To permit foreign professional corporations to practice in North Carolina without complying with the Professional Corporation Act. To permit foreign professional corporations to practice in North Carolina without complying with the Professional Corporation Act would give such foreign professional corporation an advantage over domestic professional corporations which must comply with the Professional Corporation Act.

NOTE: With respect to Question 8, this opinion modifies, in part, our opinion of January 29, 1970 to Mr. Joseph G. Maddrey, Corporation Attorney, Office of Secretary of State. The January 29 opinion had expressed the opinion that a foreign professional corporation, in good standing in its state of incorporation, could domesticate in North Carolina under Chapter 55.

Robert Morgan, Attorney General
Millard R. Rich, Jr.
Assistant Attorney General

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30 September 1970

Subject: Criminal Law & Procedure; Pre-sentence Diagnostic Study; Appealability of Commitment for; G. S. 148-12(b).

Requested by: Mr. Daniel T. Perry
Assistant Solicitor
Ninth Solicitorial District

Question: Does a defendant who has been convicted in a criminal action have the right to appeal such conviction where, before passing sentence, the trial court orders defendant to submit to a pre-sentence diagnostic study by the Department of Correction pursuant to G. S. 148-12(b)?

Conclusion: An order by the trial court subjecting a convicted defendant to confinement in the custody of the Department of Correction for a pre-sentence diagnostic study pursuant to G. S. 148-12(b) is an order in the nature of a final judgment from which the defendant may appeal.

An inquiry from the Honorable Daniel T. Perry, Assistant Solicitor of the Ninth Solicitorial District, posed the above stated question. G. S. 148-12(b) in pertinent part provides as follows:

> "Within the limits of its capacity, . . .a diagnostic center may, at the request of any sentencing court, make a pre-sentence diagnostic study of any person who has been convicted and

> is before the court for sentence, and is subject to commitment to the Department. Where necessary for this purpose, the defendant may be received in the center for such period of study as the court may authorize, but may not be held there for more than 60 days unless the court grants an extension of time, which may be granted for an additional period not to exceed 30 days. The total time spent in the center shall not exceed 90 days *or the maximum term of imprisonment authorized as punishment for the offense of which the person has been convicted if the maximum is less than 90 days. Time spent in the center for a diagnostic study shall be credited on any sentence of commitment imposed on the person studied. . . ." (Emphasis added.)*

The emphasized portion of this section clearly indicates that it was the intention of the Legislature that the time spent in pre-sentence diagnostic study be considered as at least a portion of the convicted defendant's sentence. Therefore, any order of the trial court invoking this "sentence" must be considered a final judgment for the purposes of that portion of the sentence, and is therefore appealable. Under this interpretation, appeal from the conviction is immediately available upon entry of the judgment ordering pre-sentence diagnosis. Therefore, the constitutionality of the statute, G. S. 148-12(b), could not be successfully challenged on the ground that it denies defendant his right to appeal.

Support for this position is found in the opinion of our Court in *State v. Griffin*, 246 N. C. 680. The question there considered was whether defendant could appeal a conviction where the trial court had continued prayer for judgment upon the imposition of certain conditions, a situation very similar to the question here involved. At page 682 the Supreme Court stated:

> "After a conviction. . .the court has power: (1) to pronounce judgment and place it into immediate execution; (2) to pronounce judgment and suspend or stay its execution; (3)

> to continue prayer for judgment. When the judgment is pronounced and placed into execution the defendant has the right of appeal. Likewise, when the judgment is pronounced and its execution is stayed or suspended, such disposition of the cause does not serve to delay or defeat the defendant's right of appeal (citing authority). . . .
>
> . . . It is sometimes found expedient, if not necessary to continue a prayer for judgment and when no conditions are imposed, (the courts). . .may exercise this power with or without the defendant's consent. (Citing cases). . . .(But) when the court enters an order continuing the prayer for judgment and at the same time imposes conditions amounting to punishment (fine or imprisonment) the order is in the nature of a final judgment, from which the defendant may appeal."

It is the opinion of this office that G. S. 148-12(b) in effect provides by statute an additional reason for which a sentencing court might desire to continue prayer for judgment, i.e., for the purpose of subjecting defendant to a pre-sentence diagnostic study so as to better tailor the judgment to his individual needs. If the defendant consents to this condition (deprivation of liberty during the time of the study) then no appeal is available nor is there any reason for one. However, the condition imposed, if without defendant's consent, must be considered as one involving involuntary incarceration. Therefore, the order entered by the court would be an order "in the nature of a final judgment" upon which defendant could prosecut an appeal of the conviction.

Robert Morgan, Attorney General
L. Philip Covington,
Staff Attorney

23 September 1970

Subject: Taxation; Income Taxes; Gross Income; Deductions; Alimony; Separate Maintenance; Periodic Payments; G. S. 105-141.2; G. S. 105-147(21)

Requested by: Honorable I. L. Clayton,
Commissioner of Revenue
Mr. B. W. Brown, Director
Individual Income Tax Division

Questions: (1) Are alimony payments made under a divorce decree, either absolute or from bed and board, or under a decree for alimony without divorce, when they are to be paid over a period ending not more than ten years from the date of the decree, income to the recipient, dependent spouse, and a deduction for the supporting spouse?

(2) Under (1), when payments are made under a decree for alimony without divorce, and the husband and wife are not living separate and apart, are the payments income to the recipient, dependent spouse, and a deduction for the supporting spouse?

(3) Are support payments made under a valid separation agreement providing that payments are to be made over a period not exceeding ten years, and not expressly made contingent to any event when they are to be paid over a period ending not more than ten years from the date of the agreement, income to the recipient, dependent spouse, and a deduction for the supporting spouse?

Conclusions: (1) Yes. Alimony payments made under a divorce decree, either absolute or from bed

and board, or a decree for alimony without divorce, as described in question number (1), is income to the recipient, dependent spouse, and a deduction for the supporting spouse.

(2) No. Payments made under a decree for alimony without divorce, where the parties still live together, are not income to the recipient, dependent spouse, nor a deduction for the supporting spouse.

(3) Yes. Payments made under a valid separation agreement, as described in question number (3), are income to the recipient, dependent spouse, and a deduction for the supporting spouse.

G. S. 105-141.2 requires the reporting of alimony paid under a decree of divorce or written separation agreement as includable in the dependent spouse's income to the extent it is includable for federal income tax purposes. G. S. 105-147(21) gives a corresponding deduction to the supporting spouse.

Under federal law, i.e., Internal Revenue Code §71, alimony payments are includable as income to the dependent spouse and a deduction for the supporting spouse, if they are periodic payments or installment payments for a period exceeding ten years. Periodic payments are payments that are indefinite in amount or length of time of payment. They are in effect subject to some contingency such as the death or remarriage of the dependent spouse.

Support payments for dependent children are not income to the dependent spouse or a deduction for the supporting spouse. Internal Revenue Code §71.

The contingency that makes the alimony payment contingent may be express, or implied. Rev. Reg. §1.71(d)(ii) states that "payments meeting the requirements of subdivision (i) are considered periodic payments for the purposes of section 71(a) regarless of whether – (a) the contingencies described in subdivision (i)(a) are set forth

the terms of the decree, instruments or agreement, or are imposed y local law."

ccording to Rev. Rul. 59-190, 1959-1, in the State of Washington, here the common law principle applies as it does in North Carolina, e obligation to pay alimony terminates upon the death of either ouse. This circumstance will make requied payments of a principal m over a stated period "periodic" even though the period is not ver ten years. Therefore, the following conclusions can be drawn om the above discussion.

1) When there is an alimony decree resulting from a divorce, either om bed and board or absolute, or as a result of an independent ction for alimony without divorce where the parties are living parate and apart, it is contingent under North Carolina law. The ecree is contingent, because it is subject to the following events at may alter or terminate it. The court may alter or terminate limony upon a showing of changed circumstances under . S. 50-16.9(a). "Alimony, whether permanent or temporary, rminates on the death of either of the parties." Lee, *North arolina Family Law* §154, p. 234 (Supp. 1968). Remarriage of e dependent spouse terminates alimony pursuant to . S. 50-16.9(b).

2) When the dependent spouse is receiving alimony payment ursuant to decree for alimony without divorce, but the husband nd wife are not living separate and apart, they are not within the tatute. Under North Carolina law when there is a decree of alimony ithout divorce the husband and wife may still live together, Lee, *orth Carolina Family Law* §139, p. 48 (Supp. 1968). Internal evenue Code 71(a) requires the husband and wife to live separate nd apart before the wife can include alimony payments as income, nd giving the supporting spouse the corresponding deduction.

3) When there is a separation agreement, and there is no express rovision as to what events besides the expiration of time that will rminate the obligation to pay, the payments are periodic. In North arolina, when an absolute divorce has been obtained and the pendent spouse remarries, all rights to support payments under separation agreement are ended, unless they are an integral part f a property settlement. Lee, *North Carolina Family Law* §193,

p. 405 (1967). The court cannot modify the terms of th separation agreement unless it is expressly so provided or unless th rights of children are involved, Lee, *North Carolina Family La* §199, p. 417; and *Howland v. Stitzer* 236 N. C. 230, 73 S. E. 2 583 (1952).

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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23 September 1970

Subject: ABC Act; Malt Beverages; Definition i Labelling as "Malt Liquor"

Requested by: Mr. Lee P. Phillips
Director of Enforcement
State Board of Alcoholic Control

Question: May the State Board of Alcoholic Contro permit the use of the words "malt liquor" instead of "malt lager" on malt beverage manufactured for consumption and use i the State of North Carolina?

Conclusion: The State Board of Alcoholic Control may permit the use of the words "malt liquor" instead of "malt lager" on malt beverage manufactured for consumption and use i the State of North Carolina.

The inquiry indicates that the State Board of Alcoholic Control by regulation has not allowed manufacturers of malt beverages to use the expression "malt liquor" in this State. The Board is now considering a change in that regulation and allowing use of that expression and has inquired whether use of such an expression would

b proper under the existing law.

V: find no requirement in the General Statutes that a particular epression when applied to any intoxicating liquor including vinous vne or malt beverages be used. We have reviewed the entire povisions of Chapter 18 in order to discover the various definitions a used in that chapter to apply to beverages. None of those dfinitions require any specific language to appear on the label and in fact the definitional section of the Turlington Act, Article 1 of Capter 18, provides in G. S. 18-1(1) in part that as used in that aticle:

> "The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine and in addition thereto any spirituous, vinous, malt or fermented liquors, liquids, and compounds, whether medicated, proprietary, patented or not, *and by whatever name called*, containing one-half of one per cent or more of alcohol by volume, which are fit for use for beverage purposes . . . . " (*Emphasis added.*)

(S. 18-31, in fact, uses the expression "spirituous or malt liquors" a d G. S. 18-32 uses the expression "spirituous, vinous or malt liquors" so the term "malt liquor" has been impliedly sanctioned by the statutes.

Nothing is to be gained, as to the question presented, by reviewing al of the definitional sections of Chapter 18. Suffice to say that none of them would affect the labelling of any beverage nor would they affect the extent of the State Board of Alcoholic Control's authority to regulate them by applying one label or the other.

Robert Morgan, Attorney General
(Mrs.) Christine Y. Denson,
Staff Attorney

1 October 1970

Subject: Taxation; Real Estate Excise Stamp Ta Conveyances Resulting from Corpora Distribution or Liquidation; Lack Consideration

Requested by: Mrs. Ruby Ledford
Register of Deeds of Clay County

Question: When there is a conveyance of re property as a result of a liquidation distribution by a corporation to i shareholders, is it exempt from the exci stamp tax on conveyances?

Conclusion: Yes. When there is a conveyance of re property, resulting from a distribution liquidation of a corporation, to th corporation's shareholders, it is a transf where no consideration in property money is due or paid by the transferee t the transferor and is therefore exempt fro the stamp tax under G. S. 105-228.29.

When there is a distribution or liquidation by a corporation, an pursuant thereto a transfer of real property to the shareholders c the corporation, the conveyance is not taxable under the excis stamp tax on conveyances. For the tax to be applicable, there mus be a conveyance of an interest in real property which is not exclude by G. S. 105-228.29 which provides:

> "The provisions of this article shall not apply to transfers of an interst in real estate . . . by any other transfer where no consideration in property or money is due or paid by the transferee to transferor."

This section excludes transfers where no consideration in propert or money is due or paid by the transferee to transferor. Whe

ere is a distribution or liquidation of a corporation to its areholders, the shareholders receive only a return of their invested pital. They do not give or owe anything to the corporation ecause they were, essentially, the owners of the property before e distribution or liquidation.

is true that the value of stock owned by the shareholders is duced in value or rendered valueless, but this is not an exchange here money is due or paid, but merely a change in the form of wnership. The change in form is from corporate ownership by e shareholder to individual ownership. It should be noted that hen there is a liquidation or distribution of assets the shareholder not given priority in payment of a creditor, but must wait until l debts are paid before receiving his share, Robinson, *North arolina Corporation Law* §229. This is illustrative of the status the shareholder as receiving a return of capital, rather than as creditor receiving a repayment of an obligation.

rom the foregoing, it should seem clear that a transfer pursuant corporate liquidation or distribution, is a transfer without nsideration and therefore exempt from the excise stamp tax on nveyances pursuant to G. S. 105-228.29.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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October 1970

ubject: ABC Act; Advertising Beer; Power of State Board of Alcoholic Control to Regulate

equested by: Mr. Lee P. Phillips,
Director of Enforcement
State Board of Alcoholic Control

Question: Is it lawful for beer with more than 3.2 of alcohol by weight to be advertised North Carolina by newspaper, radi television, billboard or other forms advertising?

Conclusion: It is unlawful to advertise beer wi alcoholic content of more than 3.2% b any means other than newspaper magazines and periodicals.

This opinion supplements the prior Attorney General opinions the State ABC Board dated 26 March 1970 and 5 May 1970.

G. S. 18-3 provides:

> "It shall be unlawful to advertise, anywhere or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the means, or where, how, from whom, or what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises: Provided, the foregoing provision shall not prohibit newspaper, radio, billboard or other forms of advertising for sale of beer, lager beer, ale, porter, fruit juices and/or other light wines containing not more than 3.2 per cent of alcohol by weight."

Since the only exception in G. S. 18-3 is as to beverages containin less than 3.2% alcohol, it is assumed that the prohibition appli to all other beverages. G. S. 18-3 is contained in Article 1 Chapter 18 which is The Turlington Act. G. S. 18-1(3) provide that The Turlington Act would "not make unlawful any ac authorized or permitted . . . by § § 18-36 through 18-62, th Alcoholic Beverage Control Act of 1937 as amended . . . ." Th Alcoholic Beverage Control Act of 1937 applies to alcoholi beverages which contain more than 14% of alcohol by volum (G. S. 18-60). The only advertising made lawful by that Ac however, is that advertising in newspapers, magazines and periodica

ith regard to beer (G. S. 18-52). Advertising by ABC stores and a billboards, sign boards or other similar advertising media as well by radio is prohibited. Therefore, the only exception to the ohibition in G. S. 18-3 against advertisement of beer which ontains more than 3.2% of alcohol would be the authorization for vertisement of beer in magazines, newspapers and periodicals.

Robert Morgan, Attorney General
(Mrs.) Christine Y. Denson,
Assistant Attorney General

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October 1970

ubject: State Departments, Institutions & Agencies; Ports Authority; Power of the Authority to Lease Authority Property to Private Investors

equested by: Mr. Woodrow Price, Chairman
State Ports Authority

uestion: Does the State Ports Authority have the power to lease its real property to private investors?

onclusion: The State Ports Authority has the power to lease its property to private investors where the Authority deems it proper in order to carry out the purposes of Article 22 of Chapter 143 of the General Statutes of North Carolina.

he question presented is whether the State Ports Authority has e power to lease a portion of its facility at Morehead City, North arolina, to a private investor who will erect a kiln dry lumber cility. The Authority has determined that the said lumber facility ill provide a more expeditious and efficient method for the andling of lumber in water-borne commerce from and to other

states and foreign countries.

G. S. 143-218 provides in part that the Authority shall:

> "(3) Be authorized and empowered to rent, lease, buy, own, acquire, mortgage, otherwise encumber, and dispose of such property, real or personal, as said Authority may deem proper to carry out the purposes and provisions of . . . (Article 22 of Chapter 143 of the General Statutes of North Carolina)".

In the case of *Ports Authority v. Trust Co.*, 242 N. C. 416, 422, the Court held that:

> "The General Assembly has expressly declared its intention that a liberal construction be placed upon the power conferred upon the Authority to enable it to accomplish the purposes for which it was established. G. S. 143-228."

This case and the wording of the statute itself provide ample power and authority for the execution of the lease here in question.

Where, as here, a lease promotes the accomplishment of the primary and public purposes of the Authority, the fact that the lessee is a private corporation is incidental and not controlling. *Ports Authority v. Trust Co., supra.*

The Authority, therefore, has the power to enter into the lease here in question.

Robert Morgan, Attorney General
Ralph Moody,
Deputy Attorney General
Burley B. Mitchell, Jr.,
Staff Attorney

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1 October 1970

Subject: Taxation; Privilege License Tax; Laundry and Dry Cleaning Pick-Up Stations; G. S. 105-74 and G. S. 105-85

Requested by: Mr. W. A. Watts, Assistant Charlotte City Attorney

Question: May a municipality, under the authority of G. S. 105-74 or G. S. 105-85, levy a separate privilege license tax for the operation of each laundry and dry cleaning pick-up station located within the city and owned and operated in common by a laundry and dry cleaning plant, where the actual cleaning work is not done at such stations but is performed elsewhere in the city at the laundry and dry cleaning plant?

Conclusion: A municipality is not authorized under G. S. 105-74 or G. S. 105-85 to levy a separate privilege license tax for the operation of each laundry and dry cleaning pick-up station located within the city and owned and operated in common by a laundry and dry cleaning plant, where the actual cleaning work is not done at such stations but is performed elsewhere in the city at the laundry and dry cleaning plant.

Prior to its amendment by the 1969 General Assembly, G. S. 105-74 provided that every person engaged in "any of the businesses as herein defined" shall obtain a State license for the privilege of conducting such business and pay a specified rate according to the population of the town "for each such place of business". The businesses defined in this statute prior to amendment included "dry cleaning establishments", "retail outlet" and "branch office", the latter two being defined respectively as "any place of business or vehicle where garments are accepted to be dry cleaned and/or pressed, but where the actual dry cleaning and/or pressing

is not performed on the premises . . . " and "an additional establishment where garments are accepted to be dry cleaned and/or pressed, when same is owned and operated by a dry cleaning plant. . . and under the same trade name, but where the actual dry cleaning and/or pressing is not performed on the premises". This statute further provided, as it does now, that cities and towns of under 10,000 population may levy a license tax not in excess of $25.00 and cities and towns of 10,000 population and over may levy a license tax not in excess of $50.00.

The 1969 amendment to G. S. 105-74 deleted the definitions of "retail outlet" and "branch office" and the reference thereto and in rewriting the first paragraph of this statute made the license tax applicable only to "the business of operating a dry cleaning plant, pressing club or hat blocking establishment", together with soliciting therefor where the cleaning plant or shop is located outside the city. Also, the words "for each such place of business" were not carried forward into the amended statute. Thus, cities and towns may no longer levy a license tax under G. S. 105-74 as amended upon each laundry and dry cleaning pick-up station operated by a dry cleaning plant located elsewhere within the city since such stations are not a "dry cleaning plant" within the meaning of the statute as amended. Furthermore, if it could be argued that such pick-up stations are "dry cleaning establishments" as defined in the statute, which argument would be of doubtful validity, the city would be limited to the issuance of one license and the levy of one tax for the operation of the business defined without regard to the number of stations within the city.

With regard to G. S. 105-85, this statute provides for a State tax of "the business of operating a laundry . . . and similar type businesses, where steam, electricity, or other power is used", and this statute further provides that cities and towns may levy a license tax not in excess of $12.50 on any person "engaged in the business of laundry work . . . when said work is performed outside the said county or town" and a tax not in excess of $50.00 on any other person "engaged in the business of laundry work". Here again, it would appear there is no provision under this statute for the taxation of laundry and dry cleaning pick-up stations where no cleaning work is performed. However, if it could be argued that "the business of laundry work" includes the pick-up and delivery of laundry, then

again the city would be limited to the issuance of one license and the levy of one tax for $50.00 (the laundry work being done within the city) for the operation of such business without regard to the number of stations within the city, since the authority to the extent granted in G. S. 105-85 is a limitation upon the general enabling provisions for municipal license taxation found in G. S. 160-56 which provides that a city or town may levy a tax on "all trades, professions and franchises carried on or enjoyed within the city, unless otherwise provided by law". *Guano Co. v. Tarboro,* 126 N.C. 68, 35 S.E. 231.

With respect to the authority of a municipality to tax each laundry and dry cleaning pick-up station or branch office of a business owned and operated under a common ownership and management under G. S. 160-56, the North Carolina Supreme Court in the case of *Kenny Co. v. Brevard,* 217 N.C. 269, 7 S.E. 2d 542, has held in interpreting the general power granted under G. S. 160-56 as follows:

> "It may be regarded as an established principle that in the exercise of taxing powers by a municipal corporation the requirement of uniformity must be observed, and that the classification of different subjects of taxation shall have some rational basis for the distinction, and that all persons similarly circumstanced shall be treated alike."

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General

1 October 1970

Subject: Taxation; Privilege License Tax; License Tax Upon Employment Agency; G. S. 105-90

Requested by: Mr. John H. McMurray
Morganton City Attorney

Question: May a municipality, under the authority of G. S. 105-90, levy a privilege license tax upon an employment agency which in the course of its business makes telephone calls into the municipality but has no office or property within the municipality and otherwise has no contact with it?

Conclusion: A municipality is not authorized under G. S. 105-90 to levy a privilege license tax upon an employment agency which in the course of its business makes telephone calls into such municipality but which has no office or property within the municipality and otherwise has no contact with it.

G. S. 105-90 provides that every person, firm or corporation who or which engages in the business of securing employment for a person shall obtain a State license for the privilege of engaging in such business and shall pay for such license a tax "for each location in which such business is carried on" at a rate in accordance with the population of the city or town in which the business is located. G. S. 105-90 further provides in subsection (d) that cities and towns may levy a license tax on the business taxed under this section "not in excess of that levied by the State".

The tax authorized by this statute is a location tax, and the tax as imposed by the State is levied upon an agency for each separate office location maintained by the agency and in an amount commensurate with the number of offices maintained at the rates specified according to the population of the cities and towns where they are located. Since the tax as levied by the State under this statute is based upon and is limited to the actual location of an office, it would not be in keeping with the limitation imposed by the Legislature upon municipal taxation under this statute for a municipality to expand the incidence or base of taxation to impose or seek to impose a tax based solely upon telephone contact and without regard to location of an office or other business contact within the jurisdiction of the municipality. The apparent intent of the Legislature in its enactment of G. S. 105-90(d) was to allow

political subdivisions of the State to tax such business only in the same manner and to the same extent as the State, i.e. according to office locations within the jurisdiction of the taxing authority.

Limitations or restrictions upon the general power of a municipality to levy a tax on "all trades, professions and franchises carried on or enjoyed within the city, unless otherwise provided by law" as granted under G. S. 160-56 are usually found within Article 2, Schedule B, of the Revenue Act, and G. S. 105-90(d) is an example of such restriction of this general authority. Furthermore, with regard to the application of G. S. 160-56, the Supreme Court of North Carolina has stated in the case of *Kenny Co. v. Brevard*, 217 N. C. 269, 7 S. E. 2d 542 as follows:

> "It may be regarded as an established principle that in the exercise of taxing powers by a municipal corporation the requirement of uniformity must be observed, and that the classification of different subjects of taxation shall have some rational basis for the distinction, and that all persons similarly circumstanced shall be treated alike. . . .
>
> "'License taxes must bear equally and uniformly upon all persons engaged in the same class of business or occupation or exercising the same privileges'. The powers of municipalities relating to taxation are strictly construed."

It would appear that a tax imposed only on one particular type of business and based solely upon the conduct of business by telephone by such business would be an unreasonable distinction and would not even be uniform within the classification if another similar or like business chose to conduct its business by telegraph or messenger. The Court in the *Kenny Co. case* further stated:

> "To lay a tax on merchants using streets for delivery by truck would exempt from tax obligation all merchants who use other means of transportation and delivery than by trucks, or other means of ingress than over streets."

The allowance of a tax by a municipality upon a business physically located in another city and which has as its only contact with the taxing municipality the use of the telephone lines within such municipality would far exceed the premise laid down by the Supreme Court in the case of *Hilton v. Harris*, 207 N. C. 465, for municipal taxation by a municipality of a firm located outside its borders and in another town. In the *Hilton case* the Court held that a City of Concord tax upon a bakery located in Charlotte was reasonable and proper where the Charlotte firm each day sent its trucks into the streets of Concord, and the drivers made deliveries, collected for merchandise sold, and solicited new business. The Court in this case held that the trade was carried on within Concord in direct competition with Concord-based bakeries and that to exclude the Charlotte-based bakery from the tax imposed upon Concord bakeries would have resulted in unfair competition. The substance of this decision was that the essence of the trade was conducted in Concord. This, it seems, is far different from the case where a business agency located in another city never sends a representative to the taxing municipality but instead conducts its business from and within the other city through representatives who remain in the other city.

Therefore, a municipality is not authorized under G. S. 105-90, which specifies the authority of municipalities to tax employment agencies, to levy a privilege license tax upon an employment agency which in the course of its business makes telephone calls into such municipality but which has no office or property within the municipality and otherwise has no contact with it.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General

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6 October 1970

Subject: Municipalities; Water and Sewer Systems; Water System Outside Corporate Limits; Restrictive Covenants on Land

Requested by: Mr. John B. Lewis
Farmville Town Attorney

Question: May a municipality purchase land outside the corporate limits to install a deep well to supply the town, and may the land be acquired for this purpose when it has restrictive covenants that the land shall be used for residential purposes only?

Conclusion: G.S. 160-204 and G. S. 160-255 authorize a municipality to acquire property and to own and maintain water systems both within and without the municipality. The acquisition may be by purchase or condemnation. The restrictive covenants on the land are an interest in land that must be paid for when acquired by the municipality.

In the case of *Raleigh v. Edwards*, 235 N. C. 671, 677, the Supreme Court stated:

> ". . . (T)he decided weight of authority . . . supports the proposition that such a restriction, being in the nature of an equitable servitude, is an interest in land and must be paid for when taken. The theory is that these restrictions impose negative easements on the land restricted in favor of and appendant to the rest of the land in the restricted area, and when a particular parcel thereof is appropriated for a public use that will violate the restrictions, such appropriation amounts in a constitutional sense to a taking or damaging of property of the other land owners for whose benefit the restrictions are imposed.

See also *Building Company v. Peacock*, 7 N. C. App. 77.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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7 October 1970

Subject: Education; Technical Institutes; Teachers; Scholarship Loan Fund for Prospective Teachers; Eligibility of Teacher to Receive Credit on Loan for Teaching in a Technical Institute Under the Provisions of G. S. 116-174(5)

Requested by: Mr. A. C. Davis, Controller
State Board of Education

Question: Is a teacher who teaches in a technical institute operated by contract between the State Board of Education and a county or city board of education entitled to credit on a loan made for prospective teachers under the provisions of G. S. 116-174(5)?

Conclusion: The technical institute, which is the subject of this inquiry (James Sprunt Institute of Kenansville, North Carolina), is operated by virtue of a contract between the State Board of Education and the Duplin County Board of Education and is a part of the public school system; the teacher is entitled to credit on her loan for each year taught in this technical institute.

The teacher in question has obtained a loan under the Scholarship Loan Fund for Prospective Teachers (Article 18 of Chapter 116 of the General Statutes), which Act is known as "Scholarship Loan

Fund for Prospective Teachers." Under G. S. 116-174(5) a teacher is entitled to a credit upon her loan in the amount of $350.00 for each full year taught in a North Carolina public school.

The James Sprunt Institute operates under a contract with the State Board of Education and the Duplin County Board of Education and is, therefore, a branch or satellite of the public school system of Duplin County. This technical institute fulfills obligations of the public school system for adult education under G. S. 115-199, and the authorization for its establishment is provided by G. S. 115A-5.

The technical institute established in the manner provided and above referred to is included within the public school budget and is subject to some control by the county board of education. A technical institute of this type operates under the coverage of the public school system, and, therefore, this teacher is entitled to credit for each full year taught in this technical institute. This ruling is confined entirely to technical institutes organized and established such as the James Sprunt Institute.

Robert Morgan, Attorney General
Ralph Moody,
Deputy Attorney General

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11 August 1970

Subject: Criminal Law & Procedure; Search and Seizure; Search Warrants; Surgery and X-ray of Defendant

Requested by: Mr. W. H. Barker, Assistant Prosecutor Third Judicial District

Facts: Defendant is under arrest and in custody under warrant charging first degree burglary. He has a small mobile lump under his skin on the back of his neck. Officers

have probable cause to believe it to be a .22 caliber slug fired at him by the victim in the course of his commission of the offense. Physicians are of the opinion that removal of this lump would be a minor surgical procedure with no serious consequences. Defendant will not consent to x-ray or removal.

Questions: (1) Can defendant be forced to submit to x-ray to determine the nature of the lump?

(2) If x-ray indicates the lump to be a .22 caliber slug, can defendant be forced to submit to a minor surgical procedure to remove it?

Conclusions: (1) By execution of appropriate search warrant, defendant can be forced to submit to x-ray to determine whether the lump is a slug.

(2) By execution of appropriate search warrant, defendant can be forced to submit to minor surgical procedure to remove the slug.

Physical evidence removed from a suspect's body by commonplace accepted medical procedures has been held by the United States Supreme Court to be a proper object of search and to violate no constitutional right of the suspect. *Breithaupt v. Abram*, 352 U. S. 432 (1957); *Schmerber v. California*, 384 U. S. 757 (1966).

Both cases involved withdrawal of blood for analysis of alcohol content, which was said to be "commonplace in these days of periodic physical examinations" and to belong in the category of "accepted medical practices". The procedure of x-ray would likewise be so considered.

There are several cases in which convictions upon evidence located by x-ray of the human body have been affirmed. *U. S. v. Michel*,

158 F. Supp. 34 (1957); *King v. U. S., 258 F. 2d 754 (1958),* cert. den. 359 U. S. 939; *Blackford v. U. S.*, 247 F. 2d 745 (157), cert. den. 356 U. S. 914.

Although the United States Supreme Court in *Rochin v. California*, 342 U. S. 165 (1952) reversed a conviction based upon evidence obtained by so called "stomach pump" - administration of emetics causing vomiting by way of tube forced down subject's throat - that court has refused to hear later "stomach pump" cases cited above. The tenor of more recent decisions, especially *Schmerber*, demonstrate that reasonable intrusions into the body to obtain evidence by commonplace and accepted medical practices involving no serious risk to the patient will be approved.

In *Schmerber*, at page 767, the court stated that the "overriding function" of the Fourth Amendment is "to protect personal privacy and dignity against unwarranted intrusion by the State."

And at page 768, the following appears:

> "The Fourth Amendment's proper function is to constrain, not against all intrusions, as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."

As the cases indicate, such commonplace medical techniques as stomach pump and rectal examinations have been widely used by law enforcement officers, especially in cases involving traffic in narcotics. (Stomach pump - *U. S. v. Willis*, 85 F. Supp. 745 (1949); *Barrera v. U. S.*, 276 F. 2d 654 (1960); *Lane v. U. S.*, 321 F. 2d 573 (1963), cert. den. 377 U. S. 936; Rectal examinations - In re *Woods,* 154 F. Supp. 932, (1957), cert. den. 356 U. S. 921; *Denton v. U. S.*, 310 F. 2d 129 (1962))

Several of the cases cited have involved the use of considerable force in order to obtain the evidence sought. In *Blackford*, for example, the physician was unable to remove the object from the rectum manually and had to resort to anoscope and forceps to extract it. In *Michel*, several different emetics were required before the evidence was finally regurgitated.

Most of the cases involved arrests by border police of persons suspected of smuggling narcotics and there is some authority to the effect that searches of such persons should be of the "broadest nature". However, the rationale of *Rochin, Breithaupt* and *Schmerber* is whether or not the conduct of the search "shocked the conscience of the court". The matter is dependent upon the "degree of offense to conscience or sense of justice". Annot. 16 L. Ed. 2d 1332.

This office is of the opinion that an x-ray in the case involved here would not offend the conscience of the court. The matter of removal of the slug by minor surgical procedure presents an apparent case of first impression. However, we are informed that it only involves a short and shallow incision resembling the button-hole of a shirt. The forceful rectal examination by anoscope and forceps in *Blackford* (which the U. S. Supreme Court refused to review) did not shock the conscience of the court. This office is of the opinion that the procedure involved here would not constitute an unreasonable search.

All of the cases cited herein involved searches incident to arrest and without a warrant.

In *Schmerber*, the court said:

> "Search warrants are ordinarily required for buildings and, absent an emergency, no less could be required where intrusions into the human body are involved." p. 710

In *Blefare v. U. S.*, 362 F. 2d 870 (1966), a "stomach pump" search was held invalid. One major reason given for the decision was the failure of the officers to obtain a search warrant.

G. S. 15-25 authorizes the issuance of warrants to search for evidence. The slug is evidence and it is not likely to disappear. The Attorney General suggests that the x-ray in the instant case be conducted under a valid search warrant. If its results indicate the presence of a .22 caliber slug under defendant's skin, a second search warrant should be obtained for its removal by a named qualified physician.

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

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7 October 1970

Subject: Criminal Law & Procedure; Contributing to the Delinquency of a Child; Conviction of a Person Other Than a Parent, Guardian, or Other Person Having Custody or Control of the Child; G. S. 14-316.1

Requested by: Lt. T. J. Long, Training Officer
Burlington Police Department

Question: May a person other than a parent, guardian, or other person having custody or control of a child lawfully be convicted of contributing to the delinquency or neglect of a child under the provisions of G. S. 14-316.1?

Conclusion: A person other than a parent, guardian, or other person having custody or control of a child may lawfully be convicted of contributing to the delinquency or neglect of a child under the provisions of G. S. 14-316.1.

After referring to a parent, guardian, or the person having custody of a child, G. S. 14-316.1 includes a provision that *"any other person* who knowingly or willfully is responsible for, or who encourages, aids, causes, or connives at, or who knowingly or willfully does any act to produce, promote, or contribute to, any condition of delinquency or neglect of such child shall be guilty of a misdemeanor . . ." (*Emphasis added*), and it appears that the words "willfully is responsible for" appearing in the statute as quoted above, refer to responsibility for certain acts forbidden by the statute and not responsibility for the child. Hence the conclusion stated above.

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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8 October 1970

Subject: Municipalities; Building Code; Electrical Code; Authority of City of Kinston to Apply Its Fee Schedule Against the County of Lenoir for Electrical Inspections of a County Hospital Located Outside but Within One Mile of the City Limits

Requested by: Mr. Vernon H. Rochelle
Kinston City Attorney

Question: Does the City of Kinston have the authority to apply its fee schedule against the County of Lenoir for electrical inspections of a county hospital located outside but within one mile of the city limits?

Conclusion: Although there is some conflict of authority, an ordinance adopted by the City of Kinston pursuant to charter provisions authorizes the City of Kinston to apply its fee schedule against the County of Lenoir for electrical inspections of a county hospital located outside but within one mile of the city limits.

Insa letter from Vernon H. Rochelle, City Attorney, with enclosures, the following facts appear: The County of Lenoir by action of its Hospital Board of Trustees and by voter bond approval, is constructing a new county hospital outside but within one mile of the city limits of Kinston. The City Building Inspector requested the electrical contractor to apply for a permit for the electrical work in the new hospital. The electrical contractor and his attorney concede that the City of Kinston has the right to make electrical

inspections and to require that such installation meet the requirements of the North Carolina Building Code and the City of Kinston Electrical Code; however, it is contended that the City of Kinston can not apply its electrical fee schedules for such inspections.

An ordinance adopted by the City Council of the City of Kinston provides as follows:

> "All building regulations of the City of Kinston pertaining to construction or renovation of properties within the City of Kinston, shall apply not only to the area within the corporate limits of the city, but also within the territory beyond the corporate limits, as now and hereafter fixed, for a distance of one (1) mile in all directions therefrom. All of such building regulations including plumbing, heating, electrical, air conditioning or other similar regulations now adopted or which may be adopted for the area within the city shall apply in the same force and to the same extent for such extra territorial area, and all permits, plans, inspections and fees specified in the City Code of Ordinances as may be now or hereafter adopted for such area within the city shall likewise apply with equal force to the area within one (1) mile of such corporate limits as aforesaid."

The Charter of the City of Kinston as revised by Chapter 92, Session Laws, 1961, adopted July 3, 1961, effective September 1, 1961, provides in Ch. 1, Art. 1, Sec. 1, in part as follows:

> "(j) To adopt and enforce within its limits and within one mile thereof police, sanitary, and other police power regulations not inconsistent with the General Statutes of North Carolina and all amendments thereto;"

Chapter 7, Article 3, of the City of Kinston Charter authorizes the City Council to exercise building regulation powers, including fees,

and apply the same not only within the city limits but for a distance of one mile in all directions therefrom.

Further, G. S. 160-200 (10), (29), (34), G. S. 160-202 and G. S. 160-203 grant to all cities and towns authority to make and enforce police regulations, provide for inspections and regulation of fees for such inspections, including electrical regulations, and to apply the same not only within the city limits but to the territory outside within one mile in all directions.

> "It is within the police power of the General Assembly and of a city, when authorized, to establish minimum standards, materials, designs, and construction of buildings for the safety of the occupants, their neighbors, and the public at large. G. S. 143-138; *Drum v. Bisaner*, 252 N. C. 305, 113 S. E. 2d 560; *Lutz Industries v. Dixie Home Stores*, 242 N. C. 332, 88 S. E. 2d 333. The authority to make and to enforce appropriate safety regulations in the public interest arises under the police power. In case of conflicting interests the public good is and must be paramount." *State v. Walker*, 265 N. C. 482, 144 S. E. 2d 419 (1965), 262 F. Supp. 102, aff'd, 372 F. 2d 129, cert. denied, 87 S.C. 2134, 388 U. S. 917, 18 L. Ed. 2d 1360.

> "The supervision of the construction, maintenance, and repair of buildings falls within the scope of the state's inherent police power which may be delegated by the state to a municipal corporation, as by a statute expressly authorizing a municipality to promulgate building regulations, and the exercise of such authority over buildings may constitute a proper exercise of the municipal police power." 62 C. J. S., *Municipal Corporations*, §225.

There is a conflict of authority as to whether municipal building regulations are applicable to state or county buildings. The

authorities are collected in an annotation in 31 A. L. R. 450. See also *County of Los Angeles v. City of Los Angeles*, 212 Cal. App. 2d 160; *Atkins v. Countyof Sonoma*, 430 P. 2d 57, and *Board of Regents v. City of Tempe*, 356 P. 2d 399.

The North Carolina State Building Code, adopted by the North Carolina Building Code Council on September 13, 1966, effective April 1, 1967, has the effect of law and the Courts will take judicial notice thereof. *Lutz Industries, Inc., v. Dixie Home Stores*, 242 N. C. 332. Such building code is superior to local building codes and regulations unless approved by the Building Code Council. G. S. 143-138(e). Research has not revealed any decision by the Appellate Courts of North Carolina concerning the applicability of the North Carolina State Building Code to governmental buildings. From the language used in Ch. 143, Art. 9, as amended, it appears that such code was intended to apply to all buildings, including governmental, except those specified in G. S. 143-138(b). Further, the territorial jurisdiction set forth in G. S. 143-138(e) was not intended to overrule charter municipal jurisdiction since it contains the phrase, "unless otherwise specified by a special or local act of the General Assembly".

Buildings constructed by the State of North Carolina or any agency or institution thereof are not subject to inspection nor inspection fees by municipal authorities unless inspection is requested. G. S. 143-135.1. Since counties and municipalities are referred to as subdivisions of the state under Ch. 143, Art. 8, General Statutes of North Carolina, and plans and specifications of such subdivisions are not approved by the Budget Bureau or Department of Administration, this statute is not applicable to counties or cities.

Chapters 1064, 1065, and 1066, Session Laws, 1969, providing for county and municipal inspection departments, when construed in pari materia were not intended to repeal charter provisions since the acts include the phrase, "unless otherwise specified by law". See G. S. 160-117 and G. S. 153-344.

> "When a municipal corporation is established, it takes control of the territory and affairs over which it is given authority to the exclusion of other governmental agencies." *Parsons v. Wright*,

223 N. C. 520. See also *Taylor v. Bowen*, 272 N. C. 726, and 62 C. J. S., *Municipal Corporations*, §114.

Although there is some conflict of authority, it is concluded that an ordinance adopted by the City of Kinston pursuant to Charter provisions authorizes the city to apply its fee schedule against the County of Lenoir for electrical inspections of a county hospital located outside but within one mile of the city limits.

Robert Morgan, Attorney General
William B. Ray,
Assistant Attorney General

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8 October 1970

Subject: Courts; Solicitors; Judgments; Prayer for Judgment Continued; Right of Solicitor to Pray Judgment

Requested by: Mr. J. Milton Read, Jr.
District Prosecutor
14th Judicial District

Questions: (1) After trial judge has ordered prayer for judgment continued upon payment of costs, may solicitor later move the court to enter judgment?

(2) Is there a time limit within which the solicitor must move for judgment?

Conclusions: (1) Yes. "The judgment in this case was continued upon payment of the costs, which plainly gave to the solicitor the right to pray judgment at any time." *State v. Burnette*, 174 N. C. 796 (1917)

(2) There does not appear to be a time limit within which the solicitor must move for judgment.

With regard to Conclusion (1), the right of the court to continue prayer for judgment has been long recognized in this State. *State v. Crook*, 115 N. C. 760 (1894); *State v. Hilton*, 151 N. C. 687 (1909); *State v. Everitt*, 164 N. C. 399 (1913); *State v. Tripp*, 164 N. C. 150 (1914); *State v. Griffin*, 246 N. C. 680 (1957)

Since costs are not a part of the punishment for conviction of an offense, it is recognized that imposition of costs does not affect the solicitor's right to pray judgment at a later date. *State v. Everitt, supra.; State v. Burnette, supra.; Barbour v. Scheidt*, 246 N. C. 680 (1957)

With regard to Conclusion (2), no case indicates a time limit and lapses between continuance of prayer for judgment and imposition of judgment have exceeded two years. Nor do any of the cases appear to require the solicitor to pray judgment before the same judge who originally continued the prayer for judgment although, as a practical matter, this would be advisable if it could be accomplished. In the *Everitt case*, the records of the Administrative Office of the Courts would indicate that prayer for judgment was ordered continued at the January 1944 Term of Bladen County by Judge Burney and final judgment was imposed at the January 1945 Term by Judge Nimocks.

The only case which would appear to set any limit upon imposition of judgment is *State v. Hilton*, 151 N. C. 687 (1909) wherein an order of a judge which "discontinued the cause", apparently discharging the defendant, had intervened before the solicitor moved for judgment.

The cases require notice to defendant of the solicitor's intent to move for judgment and an opportunity for him to be heard. *State v. Burnette, supra.*

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

12 August 1970

Subject: Motor Vehicles; Drivers' Licenses; Financial Responsibility Act of 1953; Unsatisfied Judgments

Requested by: Mr. Donald N. Freeman, Supervisor
Financial Responsibility Section
Department of Motor Vehicles

Facts: Party injured in an automoblie collision obtains judgment in negligence action against tort feasor. Judgment is unpaid and tort feasor's driving privilege is suspended under G. S. 20-279.13. By virtue of statute of limitations, (G. S. 1-47(1)), judgment becomes unenforceable after expiration of ten years. Prior to expiration of ten years, judgment creditor brings suit upon his judgment, resulting in second judgment against judgment debtor.

Question: Does non-satisfaction of a judgment rendered in a suit upon a previous judgment arising from an automobile accident require suspension of judgment debtor's driving privilege under G. S. 20-279.13?

Conclusion: Non-satisfaction of such a judgment is not cause for suspension of driving privilege under G. S. 20-279.13 of the Financial Responsibility Act of 1953.

G. S. 20-279.1 of the Financial Responsibility Act of 1953 defining judgment requires that the judgment be upon "a cause of action arising out of the ownership, maintenance or use of any motor vehicle".

In the situation described, the original cause of action merged into the original judgment. The second suit is separate and distinct from

the original and is founded upon a new cause of action. *Teele v. Kerr*, 261 N. C. 148 (1963).

The second cause of action is founded upon a debt. *Reid v. Bristol*, 241 N. C. 699 (1955). It does not extend the lien of the original judgment. (G. S. 1-47(1); *Land Bank v. Bland*, 231 N. C. 26 (1949)).

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

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8 October 1970

Subject: ABC Act; Beer and Wine; Sale of Sweet Wine in City of Monroe; Chapter 541, Session Laws of 1963.

Requested by: Mr. John R. Milliken
Monroe City Attorney

Question: May sweet wine be sold in the City of Monroe, as provided in G. S. 18-99, when the special act authorizing ABC stores in Monroe, Chapter 541, Session Laws of 1963, provides that the stores shall be subject to the provisions of Article 3 of Chapter 18 of the General Statutes?

Conclusion: No. Chapter 541, Session Laws of 1963, provides that the Monroe ABC Board and the operation of the ABC stores shall be subject to the provisions of Article 3, Chapter 18, except to the extent that Article conflicts with the special act.

The sale of sweet wine is controlled by G. S. 18-99, which appears in Article 5 of Chapter 18. The first sentence of G. S. 18-99 reads:

> "The provisions of Article 3 of this chapter shall apply to fortified wines."

Thus, by reference, it appers that fortified wines, as defined in G. S. 18-96, may be sold in the ABC stores. However, the foregoing quoted sentence does not apply to the first proviso of G. S. 18-99 which authorizes sweet wines to be sold at the places designated therein. If the special act had not restricted the Monroe stores to Article 3, but had made all provisions of Chapter 18 applicable, then the result would have been otherwise than as herein expressed. It should be noted that sweet wines as defined in G. S. 18-99 are not authorized for sale by virtue of a wine election. G. S. 18-64, 18-126.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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23 July 1970

Subject: Public Officers' & Employees'; Retirement; Teachers' and State Employees' Retirement System; Creditable Service; Sick Leave; Use for Purpose of Meeting 30 Years Service Qualification.

Requested by: Mr. J. E. Miller, Director
Teachers' and State Employees' Retirement System

Question: May sick leave standing to an employee's credit upon retirement be counted in determining whether such person has 30 years of creditable service?

Conclusion: Sick leave standing to an employee's credit upon retirement may be counted in determining whether such person has 30 years of creditable service.

Under the provisions of the Teachers' and State Employees' Retirement System Act, a person who retires at the age of 62, with 30 or more years of creditable service is eligible for an unreduced monthly retirement benefit. If a member retires at age 62 with less than 30 years of creditable service, his monthly retirement benefit suffers a percentage penalty as established by the actuary. The question is the application of the statute permitting sick leave when a person, who retires at 62 years of age, has 29 years and 9 months of creditable service not counting sick leave, and has three months of unused sick leave.

G. S. 135-4(e), reads as follows:

> "(e) Creditable service at retirement on which the retirement allowance of a member shall be based shall consist of the membership service rendered by him since he last became a member, and also if he has a prior service certificate which is in full force and effect, the amount of service certified on his prior service certificate; and *if he has sick leave standing to his credit upon retirement on or after July 1, 1967*, one month of credit for each 20 days or portion thereof, but sick leave shall not be counted in computing creditable service for the purposes of G. S. 135-3(8) a." *(Emphasis added.)*

In determining how to apply sick leave credit provided for in G. S. 135-4(e), the key words are those underlined above which indicate clearly that sick leave credit is allowed "upon retirement." Therefore, if a person is otherwise qualified to retire and receive retirement benefits, he is entitled to the sick leave credit described above, and sick leave credit should be counted in computing his total creditable service.

Robert Morgan, Attorney General
Harry W. McGalliard,
Deputy Attorney General

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6 August 1970

Subject: Mental Health; Drug Addicts; Use of Methadone in Treatment of

Requested by: Eugene A. Hargrove, M. D., Commissioner North Carolina Department of Mental Health

Question: Is long-term methadone treatment of narcotic addicts permitted under state law?

Conclusion: Methadone is a narcotic drug. Under North Carolina law a physicial may legally use methadone for treatment in accordance with regulations promulgated by the United States Commissioner of Narcotics under Federal Narcotics Statutes.

In a letter dated June 24, 1970, Dr. Eugene A. Hargrove, Commissioner of North Carolina Department of Mental Health, posed the question as stated above.

G. S. 90-87(9) is the sub-section of the Narcotic Drug Act which defines narcotic drugs. Although the drug methadone is not specifically named in this sub-section, it is the opinion of this office that it is a narcotic drug in that it falls under that provision of sub-section 9 which defines narcotic drugs as "other drugs to which the Federal narcotic laws may now apply".

Sub-section 9 of G. S. 90-87 was amended in 1969. Therefore, it must be construed that the phrase "other drugs to which the federal narcotic laws may now apply" at the minimum would include all drugs to which federal narcotic laws applied at the time of the

atification of the amendment in 1969. It has been determined hat at the time of the ratification of this amendment, and presently, ederal narcotic laws did and do apply to methadone. Therefore, nethadone is a narcotic drug governed by this state's Narcotic Drug Act.

G. S. 90-94 governs the administering or dispensing of narcotic drugs by physicians. In pertinent part it provides as follows:

> "A physician . . . in good faith and in the course of his professional practice, only, may prescribe on a written prescription, or an oral prescription in pursuance to regulations promulgated by the United States Commissioner of Narcotics under federal narcotics statutes, administer, or dispense narcotic drugs . . .".

It thus appears that North Carolina law allows the use of methadone by physicians in the good faith treatment of patients subject to the regulations regarding its use promulgated by the United States Commissioner of Narcotics under federal narcotics statutes.

Robert Morgan, Attorney General
L. Philip Covington,
Staff Attorney

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13 August 1970

Subject: Taxation; Privilege License Tax; Court Reporters; G. S. 160-56

Requested by: Mr. William I. Thornton, Jr.
Assistant Greensboro City
Attorney

Question: May a city or town impose a privilege license tax upon individuals regularly employed as court reporters by the State

and federal governments when suc individuals, in addition to their regula employment, take depositions and provid transcripts thereof and otherwise perforr the functions of their trade or professio separate and apart from and outside th scope of their regular employment fo attorneys and other persons and when suc individuals charge and receive a fee o compensation for such services in additio to their regular salary?

Conclusion: A city or town, unless prohibited by it charter or by special legislation, ma impose a privilege license tax upo individuals regularly employed as cour reporters by the State and federa governments when such individuals, i addition to their regular employment, tak depositions and provide transcripts thereo and otherwise perform the functions o their trade or profession separate and apar from and outside the scope of their regula employment for attorneys and othe persons and when such individuals charg and receive a fee or compensation for suc services in addition to their regular salary.

A city or town, under the general enabling provisions o G. S. 160-56, may levy a tax on "all trades, professions and franchises carried on or enjoyed within the city", unless such tax is inconsistent with any special law or the charter of the city or is otherwise prohibited by law. *Guano Co. v. Tarboro*, 126 N. C. 68, 35 S. E. 231. This power to levy a tax on all trades has been interpreted to include the power to tax "any employment or business embarked in for gain or profit." *Lenoir Drug Co. v. Lenoir*, 160 N. C. 571, 76 S. E. 480. This interpretation would seem broad enough to include within this grant of authority the power of a municipality to levy a privilege license tax upon court reporters who, in addition to their regular employment, engage in the practice of the functions of their trade or profession for

ompensation within the municipality, in the absence of a rohibition within the city charter or some statutory restriction or mitation upon the general power of a municipality to levy such x under G. S. 160-56.

imitations or restrictions upon this general power of a municipality levy a privilege tax on a trade or business are usually found within rticle 2, Schedule B, of the Revenue Act, but there is no section ithin Article 2, Schedule B, relating to court reporters, or the ormal functions of this profession, and such Schedule, including ecifically G. S. 105-41 which provides that counties, cities or wns shall not levy and license tax on certain named professions, ontains no restriction with respect to the municipal taxation of dividuals engaged in the trade or profession of court reporter or the performance of functions normally performed in the practice f such profession. No other section restricting this general uthority with respect to the practice of this trade or profession as been found within the General Statutes.

n May 26, 1942, in an opinion directed to Mr. Norman Sheppard, en attorney for the Office of Price Administration, this office rote as follows:

> "Under former rulings of this office professional men employed exclusively by the Federal or State Governments and not holding themselves out to the public in the practice of their professions are not liable for the Schedule B license tax for the privilege or engaging in their respective professions."

A municipality, therefore, may levy a privilege license tax upon ndividuals regularly employed as court reporters when such ndividuals, in addition to and separate and apart from their regular mployment, take depositions and provide transcripts and otherwise erform and engage in the functions of their trade or profession or compensation within the municipality, unless such municipality s prohibited from so doing by its charter or by special legislation.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General

18 August 1970

Subject: Infants & Incompetents; Sterilization o Mentally Defective Person; Sterilization b X ray

Requested by: Mr. Clifton M. Craig, Commissioner State Department of Social Services

Question: May a sterilization operation upon mentally defective person authorized unde the provisions of Article 7 of Chapter 3 of the General Statutes be performed b X ray provided that sterilization by X ray has been recommended by the physician who has examined the mentally defectiv person and provided that the Eugenic Board feels that sterilization in such manner is for the best interest of such mentally defective person?

Conclusion: A sterilization operation upon a mentally defective person authorized under the provisions of Article 7 of Chapter 35 o the General Statutes may be performed by X ray provided that sterilization by X ray has been recommended by the physician who has examined the mentally defective person and provided that the Eugenics Board feels that sterilization in such manner is for the best interest of such mentally defective person.

The question was submitted by letter dated August 12, 1970 from Commissioner Clifton M. Craig of the State Department of Social Services. The pertinent paragraphs of Mr. Craig's letter are as follows:

"At the Eugenics Board meeting on July 28,

1970 we were asked to secure a ruling as to whether sterilization by X ray would be permitted, since the *Order for Operation of Sterilization* states: 'Sterilization Does Not Mean Castration, Nor Sterilization by X ray.'

"The question arose because of a petition which mentioned that sterilization would be by X ray. The case is that of a mentally retarded girl with cerebral palsy who is too physically handicapped to attend to her person needs. Sterilization is for the purpose of terminating menstruation to facilitate her care."

. S. 35-36 and G. S. 35-37 provide authorization as follows:

G. S. 35-36: *State institutions authorized to sterilize mental defectives.* The governing body or responsible head of any penal or charitable institution supported wholly or in part by the State of North Carolina, or any subdivision thereof, *is hereby authorized* and directed to have the necessary operation for asexualization, or sterilization, performed upon any mentally diseased or feebleminded inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, or for the public good: . . . ." *(Emphasis added.).*

G. S. 35-37: *Operations on mental defectives not in institutions.* It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense, to have *one of the operations described in §35-56*, performed upon any mentally diseased or feebleminded resident of the county, not an inmate of any public institution, upon the request and petition of the director of public welfare or other similar public official performing in whole or in part functions of such

director, or of the next of kin, or the legal guardian of such mentally defective person: . . ." *(Emphasis added.)*

No provision appears in Article 7 of Chapter 35 of the Gener Statutes prohibiting a sterilization by X ray. Hence the conclusi stated above.

Robert Morgan, Attorney Genera
Robert S. Weathers,
Assistant Attorney General

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12 August 1970

Subject: Motor Vehicles; Drivers' Licenses; Financi Responsibility Act of 1953; Unsatisfi Judgments

Requested by: Mr. Donald N. Freeman, Supervisor Financial Responsibility Section Department of Motor Vehicles

Question: When one joint tort-feasor satisfies judgment arising from a motor vehic collision and obtains an assignment of t judgment to him, is the other joi tort-feasor relieved of the suspension of h driving privilege under G. S. 20-279.13

Conclusion: The other joint tort-feasor is not entitl to restoration of his driving privile because the judgment is not extinguish as to him.

Under G. S. 1B-7, assignment of the judgment to the paying joi tort feasor has "the effect of preserving the lien of the judgme and keeping the same in full force as against any judgment debt who does not pay his pro rata share thereof".

. S. 20-279.14 specifies that a driving privilege suspended under . S. 20-279.13 shall "remain so suspended and shall not be newed" until the judgment "is stayed, satisfied in full". Exceptions listed in both statutes are not applicable.)

ee also Comment, 5 Wake Forest Intra. L. Rev., p. 160 et seq.

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

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0 August 1970

ubject: Criminal Law & Procedure; Arrest and Bail; Arrest, Detention, Taking and Fixing Bail.

equested by: Mr. James T. Stroud, Jr., Chief District Prosecutor Fifth Judicial District

uestions:

(1) What is the duration of a bail bond?

(2) How long may a person be detained without warrant before being carried before a magistrate?

(3) Can a law enforcement officer take bail?

(4) Can a law enforcement officer arrest without warrant for a misdemeanor not committed in his presence?

(5) How long can an arrestee be detained before holding a hearing to determine if he is entitled to court-appointed counsel?

onclusions:

(1) The duration of a bail bond will

depend upon the terms of the bon instrument. The general intent c recognizance bonds is that the continue until final judgment an imposition of punishment, i punished.

(2) Persons arrested without warran must be taken before a magistrat "immediately" or if none i available, "as soon as may be" (G. S. 15-46.) G. S. 15-47 sets u a 12 hour limit, but failure t comply with it does not invalidat a subsequent trial. *State v. McCloud* 26 N. C. 518 (1970).

(3) Law enforcement officers are no among those officials authorized by Article 10 of Chapter 15 to take bail.

(4) A law enforcement officer cannot arrest without a warrant for a misdemeanor (example---shoplifting) not committed in his presence.

(5) By reason of G. S. 7A-453, the custodian of any arrested person, after 48 hours from the time taken in custody, must inform the public defender (if one exists) or the clerk of court so that a determination of indigency and entitlement to court-appointed counsel may be made. If the person under arrest states that he is indigent and desires counsel, the defernder or the clerk must be "immediately" informed.

In regard to conclusion (1), the obligations assumed by the

signatories on a bond instrument will depend upon the language of the particular instrument. In felony cases, the original bond may be so worded as to endure only until the determination of the preliminary hearing or to be in effect until defendant is finally discharged by the court. The latter seems to have been the nature of the practice in North Carolina according to reported cases. In *White v. Ordille*, 229 N. C. 490 (1948), it is said::

> "Thus in this State, a recognizance in a criminal proceeding is an acknowledgment by the defendant that he is indebted to the State of North Carolina in an amount fixed by the court, conditioned upon his personal appearance at a time and place specified by the court to answer the charge against him and abide the judgment of the court and not to depart without leave of the court."

And in *State v. Schenck*, 138 N. C. 560-564-65, (1905), it appears that the person bound:

> ". . ., after appearing, must remain until discharge, and not quit the court without leave, at any stage of the trial, the object being not only to cause the accused to appear and answer the charge, but to submit to such punishment, if any, as shall be adjudged.
>
> " . . . . We conclude that a recognizance binds the sureties for the continued appearance of their principal from day to day, during the term and at all stages of the proceeding, until he is finally discharged by the court, either for the term or without day. He must answer its call at all times and submit to its judgment. In no other way can the criminal law of the State be administered."

It is up to the court, not the professional bondsmen, to determine the language of the bonds that will be used. In fact, G. S. 15-103.2 gives the chief judge of the district court express authority to

develop and recommend policies which may be followed "on the use of bail and the amounts thereof".

With regard to conclusion (2), an officer who failed to abide by the statutes requiring arrestees to be taken before a magistrate would be civilly liable in damages to the person arrested. *Hobbs v. Washington*, 168 N. C. 293 (1915).

With regard to conclusion (3), the heart of bail is the release of the prisoner from custody. It would appear that the General Assembly intended that this important decision be made by a judicial officer in each individual case.

With requard to question (4), if the misdemeanor is not committed in the officer's presence, he has no more arrest authority than a private citizen who can arrest without warrant only for breaches of the peace. 1 Strong, N. C. Index 2d, Arrest §1. Any arrest without warrant other than as allowed by G. S. 15-41 is illegal. *State v. Mobley*, 240 N. C. 476 (1954).

In shoplifting cases (the example cited in the opinion request), one solution to the problem would be for the arrest to be made by a store employee properly qualified as a company policeman under Chapter 74A of the General Statutes.

With regard to conclusion (5), no person can be detained once he has tendered the requisite bail set for his release. In cases where the prisioner is unable to make bail, he may be detained indefinitely subject to the right to a hearing on the question of his indigency not later than 48 hours after the custodian receives the prisoner. Note that the duty to arrange hearing is upon the custodial officer, not the arresting officer. (G. S. 7A-453.)

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

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18 September 1970

Subject: Municipalities; Ordinances; Repeal; Effect of Court's Construction of Repealed Ordinance on Substituted Ordinance

Requested by: Mr. David E. Reid, Jr.
Greenville City Attorney

Questions:

(1) What effect did the adoption of Greenville Ordinance No. 337 have upon Ordinance No. 330?

(2) What effect does the Court's Order of September 14, 1970, in *Underwood, et al v. City Council of Greenville, et al*, No. 703 Civil, United States District Court, Eastern District of North Carolina, Washington Division, have upon Ordinance No. 337?

CONCLUSIONS:

(1) Ordinance No. 337 repealed Ordinance No. 330 and created a new offense.

(2) The Court's Order has no effect upon Ordinance No. 337.

Greenville City Ordinance No. 337, adopted on March 5, 1970, repealed the former Greenville City Ordinance No. 330. Although Section 1 of Ordinance No. 337 states in part that Section 3 of former Ordinance No. 330 is ". . . hereby amended by striking all and singular of said section and substituting in lieu thereof a new section . . .", the said Section 1 does not purport to state the purpose or intent of Ordinance No. 337 in its entirety. Similarly, Section 2 of Ordinance No. 337 alters only former Section 8 of former Ordinance No. 330.

Sections 3 and 4 of Ordinance No. 337 then appear to set forth the legislative intent of the Ordinance. Section 3 adopts the express amendments to former Ordinance No. 330 as well as the unamended portions by reaffirming and adopting them " . . . as if fully set

out in *this* Ordinance verbatim." (Emphasis added) The word "this" seems to clearly to refer to the new Ordinance, No. 337.

Section 4 of Ordinance No. 337 then appears to revoke the former Ordinance No. 330 by stating that "all ordinances or parts thereof in conflict with the provisions of this Ordinance are hereby repealed." The legislative intent of Ordinance No. 337 would, therefore, clearly appear to be the adoption of a new Ordinance No. 337 and the repeal of the former Ordinance No. 330.

The fact that the title of Ordinance No. 337 refers to an "amending" of Ordinance No. 330 does not, in any way, alter this opinion. The title of an act cannot control the text. *Blowing Rock v. Gregorie*, 243 N. C. 364; *Raleigh v. Mechanics and Farmers Bank*, 223 N. C. 286.

As will be noted from the above interpretation of Ordinance No. 337, there seems to be no conflict between the term "amended" used in Sections 1 and 3 of Ordinance No. 337 and the term "repealed" used in Section 4 of that Ordinance. Should a court find these two terms in conflict, however, it would not change this opinion. When two such clauses are in conflict, the latter clause must control over the former. *State Highway Com. v. Hemphill*, 269 N. C. 535; *Martin v. Glenwood Park Sanatorium*, 200 N. C. 221.

The second question relates to the effect of the Court's opinion and order in the case of *Underwood, et al v. City Council of Greenville, et al*, No. 703 Civil, United States District Court, Eastern Districe of North Carolina, Washington Division, filed September 14, 1970. That opinion and order appears to have been directed solely to former Ordinance No. 330. As will be noted the only provisions of former Ordinance No. 330 referred to by the Court are those which were *not* carried over into the new Ordinance No. 337.

It would appear, therefore, that the opinion and order of the Court has no effect upon the validity or enforceability of Ordinance No. 337. In order to remove any possible doubt, however, a motion to amend the Court's opinion and order could be filed with the Court in the above case requesting a clarification of its intent. Such

action is hereby specifically recommended.

Robert Morgan, Attorney General
Ralph Moody,
Deputy Attorney General
Burley B. Mitchell,
Staff Attorney

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27 October 1970

Subject: Motor Vehicles; Drivers' Licenses; Record; Entries on Individual's Driver's License Record; G. S. 20-26

Requested by: Mr. Robert D. Warren, Director
Drivers License Division
N.C. Department of Motor Vehicles

Question: If the Department of Motor Vehicles does not record on an individual's driver's license record a non-chargeable accident, disposition by prayer for judgment continued with no fine, and invalid bond forfeiture such as in South Carolina cases, is the Department in violation of G. S. 20-26?

Conclusion: Entry should be made on an individual's driver's license record of prayer for judgment continued with no fine. The failure to record non-chargeable accidents and invalid out-of-State bond forfeitures would not be in violation of G. S. 20-26(a).

G. S. 20-26(a) reads as follows:

> "The Department shall keep a record of proceedings and orders pertaining to all operator's and chauffeur's licenses granted, refused, suspended or revoked."

A prayer for judgment continued with no fine indicates either that the licensee has entered a plea or has been found guilty of the offense charged. Where a prayer for judgment continued is entered, final judgment could be entered at a later date. See an Attorney General's Opinion of October 8, 1970, to Mr. J. Milton Reed, Jr. District Prosecutor.

Non-chargeable accidents and invalid out-of-State bond forfeitures have no bearing on the granting, refusal, suspension or revocation of a North Carolina motor vehicle operator's license; therefore, they are not required to be recorded under the statute.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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26 October 1970

Subject: Public Officers & Employees; Medical Examiners and Coroners; Investigation of Deaths; Authority to Remove Dead Body

Requested by: Mr. C. Julian Brady
Randolph County Coroner

Questions: (1) Does a coroner or law enforcement officer or other person have the authority to take a blood sample from the body of a driver or passenger killed in an automobile accident to determine the alcohol content?

(2) Does the coroner or other person, except the medical examiner, have the authority to remove a dead body from the scene when:

(1) The person died unattended from unknown causes; (2) Death was caused by possible homicide or suicide; (3) Death was

in a motor vehicle accident; (4) Death was apparently from other accidental causes?

Conclusions:

(1) We find no authority for the coroner or law enforcement officers to take a blood sample from a dead body to ascertain the alcohol content, if any, where the person was killed in an auto accident. Although the coroner has the duty to determine when and by what means a person came to his death in those cases specified in G. S. 152-7, it is clear that the authority to make autopsies, pathological, chemical, bacteriological and toxicological studies has been vested by the General Assembly in the Chief Medical Examiner and the county medical examiner. G. S. 130-195; G. S. 130-196; G. S. 130-199; G. S. 130-200; and G. S. 90-217.

(2) Upon the death of any person apparently by criminal act or default, by suicide or under any suspicious, unusual or unnatural circumstances, or upon the death of an inmate of any penal or correctional institution, the only person who has authority to remove the body is the medical examiner. G. S. 130-198; G. S. 130-202.2.

In the examples set forth in the above question, it would be the duty of the coroner to investigate to ascertain whether death was by criminal act or default and when and by what means death occurred. G. S. 152-7(1). It would also be the duty of the medical examiner to investigate to ascertain the cause and manner of death. G. S. 130-199.

However, G. S. 130-198 provides as follows: "No person shall disturb the body at the scene of death until authorized by the county medical examiner." In addition, G. S. 130-202.2 provides that in every case requiring the medical examiner to be notified

under G. S. 130-198 the coroner shall also be notified and he shall hold his hearing in those cases as required in G. S. 152-7, but that the body shall remain in the custody and under the control of the medical examiner.

Thus, the medical examiner has control and custody of the body, and no person can disturb or remove the body at the scene of death until authorized to do so by the county medical examiner.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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27 October 1970

Subject: Motor Vehicles; Operator's and Chauffeur's License; Restoration Fee

Requested by: Mr. J. Reece Welch,
Assistant Director
Driver License Division
N.C. Department of Motor Vehicles

Question: Is an out-of-State resident required to pay the restoration fee required by G. S. 20-7(il) when his driving privilege has been suspended, canceled or revoked in North Carolina?

Conclusion: Yes.

The applicable statutes, G. S. 20-7(il) and 20-22(a), reads as follows:

> G. S. 20-7(il) - "Any person whose operator's or chauffeur's license or other privilege to operate a motor vehicle in this State has been suspended, canceled or revoked pursuant to the provisions of this chapter shall pay a restoration

fee of ten dollars ($10.00) to the Department prior to the issuance to such person of a new operator's or chauffeur's license or the restoration of such operator's or chauffeur's license or privilege, such restoration fee shall be paid to the Department in addition to any and all fees which may be provided by law."

G. S. 20-22(a) - "The privilege of driving a motor vehicle on the highways of this State given to a nonresident hereunder shall be subject to suspension or revocation by the Department in like manner and for like cause as an operator's or chauffeur's license issued hereunder may be suspended or revoked."

The restoration fee must be paid by a nonresident whose privilege to operate a motor vehicle in North Carolina has been suspended, canceled or revoked prior to restoring his privilege to operate a motor vehicle in North Carolina, even though such nonresident holds a valid motor vehicle operator's or chauffeur's license in his home state.

The provisions of G. S. 20-8, exempting from the North Carolina drivers' license requirements nonresidents holding valid operator's or chauffeur's license in their home state, must be applied in conjunction with G. S. 20-7(il) and 20-22(a). Though the North Carolina Department of Motor Vehicles cannot suspend, cancel or revoke an operator's or chauffeur's license issued in another jurisdiction, it can suspend or revoke the privilege of the holder thereof to operate a motor vehicle in North Carolina.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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27 October 1970

Subject: State Departments, Institutions & Agencies;

Housing Corporation; Appropriation by 1969 General Assembly; Payment to Housing Corporation

Requested by: Honorable Edwin Gill
State Treasurer

Question: Is it lawful to pay to the North Carolina Housing Corporation the unexpended portion of the $500,000 appropriation, or would any unexpended portion thereof revert to the General Fund at the end of the current fiscal biennium?

Conclusion: It is lawful to pay to the North Carolina Housing Corporation the entire unexpended portion of the $500,000 appropriation made thereto by the 1969 General Assembly, and any portion of it which continues to be unexpended at the end of the current fiscal biennium would not revert to the General Fund but would continue to belong to the North Carolina Housing Corporation.

Chapter 1162 of the Session Laws of 1969 provides as follows:

> "There is hereby appropriated out of the General Fund of the State to the North Carolina Housing Corporation the sum of five hundred thousand dollars ($500,000.00) for the biennium commencing July 1, 1969, provided such Corporation is created by an Act of the 1969 General Assembly."

The quoted language above constitutes the entire text of the Act except for the usual general repealing and effective date sections. Later in the 1969 Session, Chapter 1235 (codified as Chapter 122A of the General Statutes) was enacted creating the North Carolina Housing Corporation and setting out in great detail its powers and duties. Particularly pertinent to the question here considered are G. S. 122A-11 and G. S. 122A-18. G. S. 122A-11 provides in part as follows:

> "*Notwithstanding any other provisions of law to the contrary*, all moneys received pursuant to the authority of this chapter shall be deemed to be trust funds to be held and applied solely as provided in this chapter." (*Emphasis added*)

G. S. 122A-18 provides as follows:

> "The Corporation is authorized to accept such moneys as may be appropriated from time to time by the General Assembly for effectuating its corporate purposes including, without limitation, the payment of the initial expenses of administration and operation and the establishment of a reserve or contingency fund to be available for the payment of the principal of and the interest on any bonds or notes of the Corporation."

Although there is also additional supporting language in Chapter 122A, the provisions quoted above amply justify the conclusion that the 1969 appropriation to the North Carolina Housing Corporation should be turned over to the Corporation and that any portion of the appropriation unexpended at the end of the current fiscal biennium should continue to belong to the Corporation and not revert to the General Fund.

Robert Morgan, Attorney General
Harry W. McGalliard,
Chief Deputy Attorney General

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28 October 1970

Subject: Criminal Law & Procedure; Probable Cause Hearing; Degree of Proof Necessary at Probable Cause Hearing in Narcotics Case; May Law Officer Testify That Certain Substance Was Illegal Drug

Requested by: Honorable Robert Morgan
Chief Judge of the District Court
11th Judicial District

Question: At a probable cause hearing dealing with some violation of our drug laws, may a law enforcement officer testify that certain types of illegal drugs were found in the possession of the defendant or that the defendant was under the influence of drugs, and if so, is this sufficient probable cause to bind the defendant over for trial?

Conclusion: The degree of evidence required at a probable cause hearing to bind a defendant over for trial is not as stringent as that required at a trial in a criminal case. A law enforcement officer with some experience with narcotics may testify that in his opinion certain substances found in the possession of the defendant were illegal drugs or that the defendant was under the influence of narcotics, and this testimony by the law enforcement officer in connection with other incriminating facts constitutes probable cause to bind the defendant over for trial.

21 Am. Jur. 2d *Criminal Law* §443 says:

> "A preliminary examination before a magistrate is not a criminal prosecution or judicial trial of the accused. It is a mere judicial inquiry to determine whether there is 'probable cause' for the accusation, the nature of which is thereby made known to the accused.
>
> "The primary purpose of a preliminary hearing is to ascertain whether there is reasonable ground to believe that a crime has been committed and whether there is just cause to believe the defendant committed it . . . .

> "Although a preliminary examination is in no sense a trial of a person accused of a crime it is a judicial proceeding, and insofar as the magistrate acts within his jurisdiction, his decision is as binding for the purposes of such proceeding when it is right as when it is wrong."

21 Am. Jur. 2d *Criminal Law* §449 says:

> "In the absence of statutory requirement, the State need not produce all its witnesses. Its only obligation is to produce enough proof to give probable cause for believing the accused guilty of the crime charged . . . .
>
> "The rule that the accused is entitled to the benefit of any doubt does not apply in preliminary hearings. The test is not whether guilt is established beyond a reasonable doubt, but whether the evidence worthy of consideration in any aspect for the judicial mind to act upon rendered the charge against the prisoner within reasonable probabilities. Circumstantial evidence alone may be sufficient basis to hold one to answer."

In *Cabiness v. Martin*, 14 N. C. 454, our Court quoted with approval the following definition of probable cause found in *Munns v. Dupont*, 2 Brown Rep. Ap. 65. This definition has been used in numerous North Carolina cases.

> "What is the meaning of probable cause? I understand it to be the existence of circumstances and facts sufficiently strong to excite in a reasonable mind suspicion that the person charged with having been guilty was guilty; it is a case of apparent guilt, as contradistinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced; but the guilt should be so apparent at that time as would

> be sufficient ground to induce a rational and prudent man, who duly regards the rights of others as well as his own, to institute a prosecution; not that he knows the facts necessary to insure conviction; but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offense."

There are no clear cut standards or degrees by which it may be determined whether or not there is probable cause to bind a defendant over for trial. Numerous cases have held that to justify a magistrate in binding a defendant over there need only be proof that a crime has been committed and there is reasonable ground to believe the accused is guilty of the crime. Among these cases are: *People on Complaint of Lore v. Smith*, 256 N. Y. S. 2d 422; *Greene v. Whipple*, 89 N. W. 2d 881 (a North Dakota case); *State v. Clark*, 134 N. W. 2d 857 (a Minnesota case); *Mortimer v. Evans*, 386 P. 2d 261 (a Kansas case); *O'Neill v. State*, 452 P. 2d 989 (an Idaho case). See also 34 Words and Phrases 21.

People v. Bradley, 81 Cal. Rptr. 55, is a 1969 California case. This case involved prosecution for narcotics offenses. The appellate court held that it was error for the trial court to evaluate the quality of evidence presented to the committing magistrate at a preliminary hearing and to set aside the information against the defendant on that basis.

At the preliminary hearing in this case, an officer of the State Bureau of Narcotics testified that he entered a residence and as he proceeded through it "on the kitchen table he observed a pipe whose bowl was lined with tinfoil in the manner used in smoking marijuana or hashish. In the living room he noticed a partially smoked hand-rolled cigarette lying on a loud speaker." The Court said "the officer was an expert in the field of narcotics and had previously seen hundreds of hand-rolled marijuana cigarettes. He arrested Miss Bradley for possession of marijuana and for possession of narcotic paraphernalia. . . ." It seems proper to infer from this case that the Court believed the type of testimony given by the officer at the preliminary hearing was sufficient probable cause to bind the defendant over for trial.

People v. Anderson, 71 Cal. Rptr. 827, is a 1968 case. The Court held that a regular city police officer who on stopping a defendant for speeding looked through the windshield of the defendant's car and saw on the floorboard one-half of a hand-made cigarette which was similarly constructed to marijuana cigarettes had reasonable ground for believing that the defendant was in illegal possession of marijuana and the officer's testimony before the committing magistrate was sufficient to show probable cause to hold the defendant for trial.

The Court said at page 832:

> "Reasonable grounds for believing a package contains contraband may be adequately afforded by its shape, its design, and the manner in which it is carried. *People v. Rosemont*, 221 Cal. App. 2d 500, 502, 34 Cal. Rptr. 667.
>
> "It is a matter of common observation that tobacco smokers who roll their own cigarettes do so usually only just before smoking; the home-made, machine rolled cigarette is something distinctive.
>
> "The cigarette first seen by Hill (the police officer) was a pre-prepared, hand-rolled cigarette but was seen in a position suggesting it had been concealed.
>
> "In the light of Hill's experience, those circumstances were sufficient to give rise to a reasonable suspicion that it was a marijuana cigarette."

There is no evidence that the officer in this case had had any more experience with narcotics than any other ordinary law enforcement officer.

In *People v. Cole*, 62 Cal. Rptr. 874, it was held that the testimony of arresting officers that defendant was one of four

persons seated in a living room of an apartment from which there was an odor of marijuana, that one of those present stated they were rolling seeds, that marijuana and marijuana cigarettes were in plain sight and that one of the officers observed that the persons appeared drugged, provided ample evidence to support a finding that there was sufficient cause to believe defendant was in possession of marijuana, so that defendant could be held to answer the charge of possession of marijuana.

People v. Shaffer, 5 Cal. Rptr., is a 1960 case. Defendant was charged with unlawfully furnishing or giving marijuana to a minor. The Superior Court set aside the information on the ground that the defendant had been committed without probable cause and the State appealed. The Appellate Court held that although marijuana cigarettes which defendant allegedly supplied were not produced at the preliminary hearing, corpus delicti of the crime that it was in fact marijuana was adequately established by the testimony of the witness shown by her knowledge of marijuana from previous use, appearance of the cigarette, effect upon her of smoking the cigarette and testimony of the police officer that the effects described by the witenss were producible only by smoking a marijuana cigarette. The evidence was sufficient to justify holding the defendant to answer.

People v. Johnson, 317 P. 2d 1000, is a 1957 California case. Here defendant was charged with unlawful possession of heroin and committed for trial. The Superior Court set aside the information on the ground that the defendant had been committed without probable cause. The State appealed. The Appellate Court held that the evidence before the magistrate, including heroin obtained from defendant's pocket as a result of a reasonable search incident to a lawful arrest, disclosed probable cause for committing defendant for trial.

In this case a Los Angeles city police officer saw the defendant in the company of another man, whom the officer knew to be a narcotics user. The officer observed that the pupils of the defendant's eyes appeared to be pin-pointed. In the officer's opinion, contraction of the pupils of the eye is a characteristic of narcotics addicts. The officer talked with the defendant and the defendant admitted that he used narcotics several days before. The officer

noticed that the eyes were unusually red and that his clothing gave off a strong and distinctive odor, which, from the officer's experience, he identified as probably the odor of marijuana. The officer examined the defendant's arm and noticed a red mark on the inside of the left elbow. The defendant was then placed under arrest and when searched a paper bindle which was proved to contain heroin was found. The Court said: "These observations, if made by one qualified to give expert testimony, together with the admissions made by defendant, would have warranted a good faith belief that defendant was addicted to the unlawful use of narcotics . . . . There was sufficient evidence of the officer's qualifications to give testimony as an expert witness on the subject of narcotics addiction." (The only qualifications listed in the report of this case was that the officer was assigned to the Juvenile Division.)

State v. Roberts, 276 N. C. 98, is a case in which the defendant was charged with unlawfully and feloniously having in his possession and control a number of LSD tablets. The case turned on whether or not an arrest without a warrant and a search made incident to such arrest was proper; that is, whether or not there was probable cause for the arrest without a warrant.

Lake, J., speaking for the Court said: "The undisputed evidence in this case is clearly sufficient to support the finding by the trial judge that the arresting officer had reasonable ground to believe the defendant, at the time of his arrest, was in possession of some quantity of this substance and, therefore, was presently committing a felony in the presence of these two officers."

In this case, a special agent of the State Bureau of Investigation, who was conducting narcotics investigations in the city, received information from a confidential informer that the defendant was in possession of LSD and was "dealing in it" at a certain location in the city. The SBI agent and another officer observed the defendant at the place named by the informer. Lake, J., said "What they saw, considered in the light of their own experience in the investigation of such offenses, confirmed, in their opinion, the information so given by the informer to (SBI officer)." The defendant left the place he was and entered a nearby washerette. The officers followed the defendant and arrested him. The Court said "under these circumstances, the officers clearly had the right

to arrest the defendant though they had no warrant for his arrest. Having the right to arrest him, they had the right to search him and to take from him the lysergic acid diethylamide then actually concealed in a finger of the glove worn by the defendant."

This case would seem to throw some light on what degree of evidence is necessary to constitute probable cause in a narcotics case in North Carolina.

31 Am. Jur. 2d *Expert and Opinion Evidence* §131 says:

> "The identification of an odor as that of a certain drug or poison may be made and testified to by any person familiar with the drug or poison in question." See *State v. Buck*, 127 P. 621; *State v. Hyde*, 136 S. W. 316; *Carrizal v. State*, 134 S. W. 2d 287; *Hernandez v. State*, 129 S. W. 2d 301.

31 Am. Jur. 2d *Expert and Opinion Evidence* §102 says:

> "The rule giving a witness the right to state his opinion, based upon observed facts, as to the intoxicated condition of a person has been held in some cases to apply also to opinion evidence as to whether a person was under the influence of some narcotic or other drug. But there is other authority that special experience is required to qualify a witness to give an opinion as to whether a person was under the influence of narcotics."

Stansbury, North Carolina Evidence (2d ed. 1963) §133 says:

> "Whether a witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is within the exclusive province of the trial judge. To be an expert the witness need not be a specialist or have a license from an examining board or have had experience with the exact type of

> subject matter under investigation, nor need he be engaged in any particular profession or other calling. It is enough that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject."

State v. Cook, 273 N. C. 377, is a 1968 case. Here the defendants were convicted under G. S. 90-113.2(3) for the unlawful possession of a barbiturate or stimulate drug. Police officers, pursuant to a search warrant, searched a house in Charlotte and observed that the defendants were staggering and had sleepy, glassy, dilated eyes and no odor of alcohol. Nembutal capsules were found in the house. The defendants were arrested and later handed thirty-three barbiturate pills to an officer. One of the assignments of error on appeal was that lay evidence was admitted to prove that the defendants were under the influence of drugs. Huskins, J., in finding no error in this case cited *State v. Brodie*, 190 N. C. 554, as authority for the fact that if by reason of opportunities for observation he is in a position to judge facts more accurately than those who have not had such opportunities, the testimony of a witness will not be excluded on the ground that it is a mere expression of opinion. Justice Huskins cited the above material from 31 Am. Jur. 2d *Expert and Opinion Evidence* §102 and then said:

> "Seeing defendants in their drugged conditions and observing their manner of speech and movement, the witness was better qualified than the jury to draw inferences and conclusions from what he saw and heard. Their condition was a surrounding circumstance relevant to the issue of the trial, that is, the alleged unlawful possession of barbiturate drugs. Hence, under the facts of this case it was not prejudicial error to permit the officer to describe their condition to the jury and express and opinion based thereon that the defendants were under the influence of drugs. This assignment is overruled."

There is no evidence in this case that the police officers were experts

in the field of drugs. If testimony from such officers was held competent at trial, it should be allowed and considered at a probable cause hearing.

It seems that the North Carolina rule laid down by the *Cook* case ventures beyond the limits imposed by the courts of some jurisdictions, which usually require some experience with narcotics addiction before the witness can testify.

The California courts have dealt with the problem fairly frequently. They have had no trouble admitting the evidence if the witness is a medical expert and have consistently allowed police officers, with experience in narcotics, to give their opinion. But where the witness is inexperienced with narcotics, the California courts have been more strict in permitting opinion evidence. In *People v. McLean*, 365 P. 2d 403, a 1961 case, the California court held it was error to permit a 16-year old girl to testify that a cigarette given her by defendant contained marijuana where the girl had no previous experience with marijuana and had based her opinion on her own reactions compared with what she had read and seen and with the effects of marijuana as described to her by other people. It would seem to follow that an inexperienced bystander observing someone else would not be permitted to give his opinion either. But see *People v. Anderson, supra*, where a California police officer with no apparent expertise in narcotics, was allowed to give his opinion that hand-rolled cigarettes which he observed were marijuana.

What seems to be the rule in North Carolina as set out in the *Cook* case is that an ordinary layman is qualified to give his opinion as to whether a person is under the influence of narcotics just as he has always been able to do with regard to alcohol. It should be noted, however, that the *Cook* case deals only with an opinion that the defendants were under the *influence* of drugs and not that he *possessed certain types of drugs*. At this time, based on the *Cook* case and other cases both from this jurisdiction and from other jurisdictions, it does appear that one with a limited amount of experience with drugs would be allowed to testify in North Carolina that a defendant was under the influence or in the possession of unlawful drugs and that this testimony would be sufficient probable cause to bind the defendant over at a preliminary

hearing. It might be that the testimony of one with little or no experience with narcotics would be properly accepted and would constitute probable cause at a preliminary hearing, especially if there is other evidence supporting this testimony.

Robert Morgan, Attorney General
Ernest L. Evans,
Staff Attorney

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29 October 1970

Subject: Marriage; Miscegenation; Issuance of Marriage License; County Where a License is Valid; Status of Marriage Without Proper License.

Requested by: Mr. Marshall Watterson
Register of Deeds
Henderson County

Questions:

(1) Is it lawful for a register of deeds to issue a license for the marriage of a white person and a Negro?

(2) Is a marriage license valid only in the county in which it is issued?

(3) Is a marriage valid even though the marriage ceremony was performed pursuant to a license issued in some county other than the one in which the marriage ceremony was performed?

Conclusions:

(1) It is lawful for a register of deeds to issue a license for the marriage of a white person and a Negro.

(2) A marriage license is valid only in the county in which it is issued.

(3) A marriage is valid even though the marriage ceremony was performed pursuant to a license issued in some county other than the one in which the ceremony was performed.

The question of the validity of statutes prohibiting the marriages between white persons and Negroes was ruled upon by the Supreme Court of the United States in the case of *Loving, et ux, v. Virginia* on June 12, 1967. That decision specifically considered a Virginia statute. However, former Chief Justice Warren listed the states, sixteen states in all, which had enacted statutes outlawing interracial marriage, and North Carolina is listed in this group of states. The last sentence in the opinion of the Supreme Court of the United States (page 11) states:

FOURTEENTH AMENDMENT

> "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."

In an opinion of this office dated 15 June 1967, the following conclusion was reached:

> "In view of the sweeping language and widescope of this Opinion, we see no need for the various Registers of Deeds of North Carolina to wait until some suit is brought in the Federal Courts of this State and the specific North Carolina statutes be declared to be unconstitutional by Federal decree. Any Federal Court in which such a suit is instituted would

> immediately declare our statutes unconstitutional by virtue of the precedent and authority of the above cited Loving case from Virginia. We are of the opinion therefore that the Registers of Deeds of North Carolina should disregard the provision of the North Carolina Constitution (Article XIV, Section 8) and should also disregard the North Carolina Statutes (G. S. 14-181; 14-182; 51-3) and when an application is filed with a Register of Deeds of this State for the issuance of a license for a marriage between a white person and a colored person or a Negro, then the license should be issued if such applicants are otherwise eligible for marriage."

G. S. 51-6 provides that a marriage ceremony shall not be performed by any minister or officer until there is presented to him a marriage license issued by the register of deeds of the county in which the marriage ceremony is to be performed. Any person who performs a marriage ceremony without a valid marriage license being presented to him is subject to a civil penalty and is guilty of a misdemeanor under the provisions of G. S. 51-7.

Notwithstanding the statutory prohibition against performing a marriage ceremony without a valid marriage license, our Supreme Court has held that a marriage is not invalid because of being solemnized under an illegal license. *Maggett v. Roberts*, 112 N. C. 71; *Wooley v. Bruton*, 184 N. C. 438.

Robert Morgan, Attorney General
Harry W. McGalliard,
Chief Deputy Attorney General

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29 October 1970

Subject: Taxation; Ambulance Liens; Garnishment and Attachment; Collection from Without

the County; G. S. 44-51.4; G. S. 105-385; G. S. 105-386

Requested by: Mr. Albert J. Post
Rockingham County Attorney

Question: Can the tax director for a county forward for garnishment and levy to the tax director of another county tax liens arising from nonpayment for ambulance services in the county where the lien originated?

Conclusion: The tax director for a county can forward for garnishment and levy to the tax director of another county tax liens arising from nonpayment for ambulance services in the county where the lien originated.

The question has arisen as to whether the tax director of a county can forward tax liens arising out of ambulance services for garnishment and levy in that county. G. S. 44-51.1 creates a lien on real property against the recipient of ambulance service paid for or provided by the county or municipality, and G. S. 44-51.4 provides a corresponding lien procedure against personal property. G. S. 44-51.4 provides as follows:

> "Whenever ambulance services are provided by a county or by a municipally owned and operated ambulance or one legally responsible for the support of a recipient of such services fails to pay charges fixed for such services for a period of ninety days after the rendering of such services, the county or municipality providing the ambulance services may treat the amount due for such services *as if it were a tax due* to the county or municipality and may proceed to collect the amount due through the use of attachment and garnishment proceedings as set out in G. S. 105-385(d)." (*Emphasis added.*)

G. S. 44-51.4 imposes a right of action against the personal property of the recipient of ambulance services paid for by the county or municipality. It further states that the county or municipality providing the service may treat the amount due as if it were a tax due, specifically providing for the remedy of attachment and garnishment.

G. S. 105-385 provides as follows:

> "To proceed under this subsection, the collector shall serve *or cause* to be served upon the taxpayer and the person owing or having in his possession the wages, rents, debts or other things sought to be attached, ..." (*Emphasis added.*)

G. S. 105-386 provides as follows:

> "If a taxpayer has no property in the taxing unit to which the taxes are due, but does have property in some other unit, or if the taxpayer has removed from the taxing unit in which the taxes are due and has left no property there and is known to be in some other unit in this State, it shall be the duty of the collector to send a copy of the tax receipt, with a certificate stating that such taxes are unpaid, to the collector of the unit in which such property is located or, in which such taxpayer is known to be . . . ."

G. S. 105-386 provides for collection without the taxing authority under certain circumstances. This statute appears to be applicable to the situation at hand, since the ambulance lien is treated as a tax unpaid and due. Note too, that G. S. 105-385 states "the collector shall serve *or cause* to be served", indicating the Legislature did not intend for the collector to act alone and entirely within his jurisdiction, but can seek collection in other taxing units with the aid of the respective tax collector.

From a close reading of the foregoing quoted statutes, it is apparent that the tax director of one county can forward ambulance tax liens to the tax director of another county for garnishment and levy in

that county.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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29 October 1970

Subject: Taxation; Income Taxes; Gross Income; Exemptions; Annuities

Requested by: Mr. B. W. Brown, Director
Individual Income Tax Division

Question: Are contributions made by a university to an insurance contract annuity for the benefit of its employees, gross income to the employees?

Conclusion: Yes. No exclusion is provided in the North Carolina Revenue Act and therefore it is income to the employees.

Duke University has initiated a retirement plan for certain employees, primarily managers, supervisors and various ranks of teaching personnel. The contribution by Duke is 7% of the employee's gross income. The benefits under the retirement plan are funded through the use of individual annuity contracts. There is no contract between Duke and the insurance company nor is there a trust agreement that spells out the provisions of the plan. The plan is initiated by the passage of a resolution by the institution's governing board setting forth the principal provisions of the plan. The plan has not "qualified" for federal purposes, because it is exempt from Federal taxes by statute.

The question has now arisen whether contributions made by the

Jniversity toward an annuity for the benefit of certain of its mployees are taxable as income to such employees in the year in vhich the contributions are made, under the North Carolina ndividual income tax.

The North Carolina income tax is imposed upon a taxpayer's net ncome, which is arrived at by computing his gross income less llowable deductions. G. S. 105-133; G. S. 105-140. To determine vhat is includable in gross income, we must look to G. S. 105-141(a), which requires inclusion of compensation for personal service, of whatever kind and in whatever form paid.

To constitute taxable compensation for personal service, instead of a nontaxable gift, there must be something which makes payment more than an unrestrained act of affection or regard. Clearly, the purchase of annuity, as a condition of employment for the employee is more than an unrestrained act of affection or regard. See *Bogardus v. Helvering*, 88 F. 2d 646 (2d Cir. 1937) and *C. I. R. v. LoBue*, 351 U. S. 243, 76 S. Ct. 800, 100 L. Ed. 1142 (1956).

Certain payments may be excluded from income if they are expressly provided for by statute, and this has been done in G. S. 105-141(b), which contains exemptions from gross income. However, it should be noted that this statute does not exclude payments by an employer to an annuity for its employee under the circumstances present here.

Section 403 of the Internal Revenue Code provides for deduction of payments to certain "tax sheltered" annuities. However, there is no comparable section in the North Carolina Revenue Act. Affirming this conclusion is the fact that an amendment to G. S. 105-141(b) was introduced during the 1969 Session of the General Assembly (House Bill 515) which would have exempted from gross income that "portion of amounts contributed for the purchase of an annuity contract for an employee by an employer . . ." of certain described types. This bill was never reported out of the House Appropriations Committee. Obviously, if the Legislature had intended the adoption of the Federal treatment, it would have passed the bill.

G. S. 105-142 provides that "the amount actually distributed or made available to any employee or the beneficiary of an employee

by an employee's trust. . .shall be taxable to the employee or his beneficiary in the year in which distributed. . .". This section applies only to exempt organizations under G. S. 105-161, more particularly subsection (f). Subsection (f) provides that certain trusts shall be exempt from taxation, in particular, pension, profit-sharing, stock bonus and annuity trusts or combinations thereof, established by employers. It also requires that "there is no discrimination, as to the eligibility requirements, contributions or benefits, in favor of officers, shareholders, supervisors, or highly paid employees. .". The annuity under consideration here is not a trust established by an employer but is, rather, an annuity contract between an employer and an insurance company, for the benefit of an employee.

It should be further noted that G. S. 105-142(d) does not involve the situation wherein the employer is making contributions into an annuity but rather involves a situation wherein the employee is receiving benefits from the trusts.

G. S. 105-141.1 has to do with the inclusion of annuity income in gross income. It does not speak to the question considered here.

An examination of the deduction provisions of G. S. 105-147 shows that not one of the many subsections of that statute is addressed to the question of deductability of such contributions from gross income, nor should any be implied. Deductions are in the nature of exemptions which are strictly construed in favor of the State. *Ward v. Clayton*, 5 N.C. App. 53 (1969), aff'd 276 N.C. 411 (1969).

G. S. 105-147(20) provides for a deduction for the employer for these amounts paid by employers to trusts which qualify under G. S. 105-161(f)(1). This section does not resolve the question at hand.

It provides that the employer shall receive a deduction for payments to the annuity trusts. Treated much as a regular business expense, the same would be true for payment of compensation to the employee.

'herefore, contributions by Duke University made to the annuity nder consideration here must be included in the employee's gross ncome for State income tax purposes.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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:9 October 1970

Subject: Social Services; Medical Assistance; Payment of All Nonfederal Costs by the State for Indians on Certain Reservations

Requested by: Mr. Clifton M. Craig,
Commissioner
North Carolina Department
of Social Services

Question: Under the provisions of G. S. 108-53, is it required that the non-federal share of the costs of medical assistance (medicaid) provided to Indians living on federal reservations held in trust by the United States on their behalf be paid entirely out of State funds instead of State and county funds?

Conclusion: Under the provisions of G. S. 108-53, it is required that the federal share of the costs of medical assistance (medicaid) provided to Indians living on federal reservations held in trust by the United States on their behalf be paid entirely out of State funds instead of State and county funds.

The conclusion stated above appears to be required unequivocall by the provisions of G. S. 108-53 and G. S. 108-23.

G. S. 108-53(b) is as follows:

> "The nonfederal share of the annual cost of public assistance provided to Indians living on federal reservations held in trust by the United States on their behalf shall be borne entirely by the State. The Commissioner shall reserve from State appropriations for public assistance an amount sufficient to pay the county's share of the cost of public assistance to eligible Indian residents of federal reservations, plus related administrative costs incidental to providing such assistance, and shall pay same to counties containing such a federal reservation."

G. S. 108-23, is in pertinent part, as follows:

> "The following programs of public assistance are hereby established, and administered by the county department of social services under policies adopted by the State Board of Social Services and under the supervision of the State Department of Social Services. . ."
>
> (4) Medical assistance, ..."

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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30 October 1970

Subject: Taxation; ABC Act; Tax on Spirituou Liquors; "Net Profit" Limitation; Law Enforcement Expense; G. S. 18-45(15)

G. S. 18-85(a)

equested by: Mr. Thomas C. Ruff
Mecklenburg County Attorney
Mr. Henry W. Underhill, Jr.
Charlotte City Attorney

uestion: In determining the tax upon spirituous liquors taxed under G. S. 18-85(a), which is limited to an amount not exceeding one-half of the net profit from sales of liquor, is that portion of total profits required to be spent upon law enforcement properly deductible from gross receipts as an expense of operation in determining net profit?

onclusion: That portion of total profits from the sale of liquor which is required to be spent upon law enforcement is not properly deductible from gross receipts as an expense of operation in determining net profit for the purposes of G. S. 18-85(a).

. S. 18-85(a) levies a tax of 10% on the retail price of spirituous istilled liquors sold in North Carolina, in lieu of the sales and use ax which would otherwise be imposed. However, upon sales by ounty and municipal liquor stores, the tax so paid is limited to n amount not exceeding one-half of the net profits from liquor ales in such stores. In other words, if one-half of the net profits vere $5,000, but 10% of the retail price of liquor sold were $6,000, he amount of tax to be remitted to the State would be $5,000.

. S. 18-45(15) grants to county ABC boards numerous powers and luties, including a requirement that there be expended "for law nforcement a sum not less than five percent nor more than ten ercent of the total profits" from the sale of liquor. Thus it appears hat county boards *must* spend at least five percent of the total rofits on law enforcement, and with respect to that mandatory mount, inquiry has been made whether that amount may be leducted from the gross sales of liquor in arriving at net profit,

one-half of which forms a ceiling beyond which the tax cannot go.

Generally, profit is spoken of as "gross profit" and "net profit". Gross profit is merely the excess of the price received over the price paid for goods.

Hill v. City of Richmond, 181 Va. 744, 26 S. E. 48.

Thus, if liquor was acquired for $20,000 and sold for $30,000, the gross profit would be $10,000, but no suggestion has been made that that amount would be the figure subject to the 5% expenditure, nor, in our opinion, would such a position be tenable.

On the other hand, "profit" and "net profit" are, for all legal purposes, synonymous expressions.

Buie v. Kennedy (1913) 164 N. C. 290, 80 S. E. 445.

Thus we conclude that "total profit" as used in G. S. 18-45(15) and "net profit" as used in G. S. 18-85(a) are synonymous. That being the case, G. S. 18-45(15), in applying a percentage to net profit, indicates that net profit must have already been determined before application of the percentage. If that determination must be made before application of the percentage, then the expense for law enforcement cannot be one of the costs of operation deductible from gross receipts to arrive at net income. Instead, it appears to be a legislative determination of the manner in which a portion of the net profit must be spent.

It is noted that the Commissioner of Revenue has similarly interpreted these statutes for many years, and that a previous opinion of this office, dated 11 September 1962, likewise reached the same result.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General

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30 October 1970

Subject: Taxation; ABC Act; Tax on Spirituous Liquors; "Net Profit" Limitation; G. S. 18-85(a); G. S. 18-85.2

Requested by: Honorable I. L. Clayton
Commissioner of Revenue of
North Carolina
Mr. W. C. Pickett, Jr.,
Director
Privilege License, Beverage and
Cigarette Tax Division

Question: May the spirituous liquor tax levied under G. S. 18-85(a) and G. S. 18-85.2 be deducted by county and municipal ABC stores from gross sales, as a cost of operation, for the purpose of determining "net profit", one-half of which forms a ceiling beyond which the tax levied under G. S. 18-85(a) may not go?

Conclusion: The taxes levied under G. S. 18-85(a) and G. S. 18-85.2 may not be deducted from gross sales of liquor in determining "net profit", one-half of which forms a ceiling beyond which the tax levied under G. S. 18-85(a) may not go.

G. S. 18-85(a) levies a tax of 10% on the retail price of spirituous distilled liquors sold in this State, in lieu of the sales and use tax that would otherwise be due. G. S. 18-85(b) levies a surtax of 2% on that retail price, and G. S. 18-85.2 levies an additional tax of 5 cents for each three and one-third ounces or fractional part thereof of such liquor. The application of these taxes is somewhat complicated, however, by a provision in G. S. 18-85(a) which specifies that in no event shall the amount paid under that section (the 10% tax) by county or municipal ABC stores exceed one-half of the net profits from liquors sold through such stores. (G. S. 18-85(b) and G. S. 18-85.2 contain express provisions that this limitation shall not apply to the taxes levied in those sections.)

Since "net profit" must be determined in order to determine the limitation under G. S. 18-85(a), a question has been raised as to whether the taxes collected under G. S. 18-85 and G. S. 18-85.2 form a portion of the gross figure from which cost of goods and costs of operation are deducted to arrive at "net profit". We are of the opinion that they do.

The 10% tax (G. S. 18-85(a)) is in lieu of sales tax. In the case of the sales tax, it constitutes a part of the purchase price of the property sold. G. S. 105-164.7. We think that the "in lieu" nature of the 10% tax requires it to be similarly treated. The taxes levied under G. S. 18-85(b) and G. S. 18-85.2 are "in addition" to the 10% tax, according to those statutes and in that sense partake of the same nature as the 10% tax. Furthermomore, G. S.18-39(3) specifies that the retail price plus the taxes levied in G. S. 18-85 shall be the "total price", to which is added the tax levied under G. S. 18-85.2 pursuant to the provisions of that statute. Thus it seems that "total price" is "retail price" plus the taxes levied by §§18-85(a) and (b) and 85.2, and that the "total price" of all liquor sold constitutes that gross figure from which net profit is obtained by deducting the cost of goods sold and the costs of operation.

Having reached that conclusion, the next question is whether these taxes may be deducted as a cost of operation from gross sales to arrive at "net profit", one-half of which amount forms a ceiling beyond which ABC stores may not be required to remit to the State. Our opinion is that they may not.

As previously noted, the 10% tax is similar to the sales tax levied on retail merchants and measured by their gross receipts from retail sales. Costs and expenses are clearly not allowable deductions from the merchant's tax base merely because the measure of the tax is the aggregate amount of their gross sales. For the same reason, costs and expenses are not deductible from the gross sales of ABC stores in applying the limitation set out under G. S. 18-85(a).

The limitation takes effect only if and when the 10% figure exceeds one-half of the net profit after deducting costs and expenses, not including the taxes as a cost or expense. The tax is still based upon gross sales receipts, notwithstanding the limitation. The limitation merely provides that if the 10% tax, as computed on the gross sales,

will absorb more than one-half of the net profits, the tax to be remitted shall be deducted by the amount necessary to assure that no more than one-half of such profit is taken. In other words, if gross sales were such that the 10% tax would be $10,000.00 and the net profit from such sales was only $12,000.00, the tax would be reduced to $6,000.00, or one-half of net profit. On the other hand, if net profit were $30.000.00, the tax would be $10,000.00, or the full amount of the 10% tax.

It is noted that this has been the administrative interpretation of the Commissioner of Revenue for at least thirty years and there appears to be no sound reason to depart from it.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General

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30 October 1970

Subject: Taxation; Income Taxes; Exemptions; Government Instrumentalities; Federal National Mortgage Association

Requested by: Mr. B. W. Brown, Director
Individual Income Tax Division

Question: Whether the bonds, obligations and stock of the Federal National Mortgage Association are exempt from state income and intangibles tax?

Conclusion: The bonds, obligations and stock of the Federal National Mortgage Association are not exempt from state income and intangibles tax.

The question has arisen as to whether the bonds, obligations and stock of Federal National Mortgage Association are taxable by the

State. The taxability of FNMA depends upon two elements: is it a government instrumentality and what was the intent of Congress in regard to taxation?

One authority states:

> "The question as to what instrumentalities of the federal government are exempt from taxation by a state cannot be stated in terms of universal application; each case must be determined from its particular facts. In this connection, it has been held that every agency which Congress can constitutionally create is a governmental instrumentality. More particularly, important factors to be considered are whether the agency was created by the government, is *wholly owned* thereby, is not *operated for profit*, and is primarily engaged in the performance of some *essential governmental function*." 84 C. J. S. *Taxation* §207(b) p. 398-399. "The validity of state taxation of federal instrumentalities must depend on the power of congress to create the instrumentality and the *intent of congress*, as manifested by law, to protect it from, or to render it subject it to, state taxation." 84 C. J. S. *Taxation* 207(a) at p. 395. (*Emphasis added.*)

FNMA is a creation of the United States Congress, but it is not a wholly owned corporation. In fact the legislative history states:

> "The principal change would be the fulfillment of congressional intent expressed 14 years ago in section 303(g) of the Federal National Mortgage Association Charter Act, 'to transfer to the owners of the outstanding common stock of the Association the assets and liabliities of the Association in connection with, and the control and management of, the secondary market operations of the Association under section 304 of this title in order that such

> operations may thereafter be carried out by a privately owned and privately financed corporation.' The committee feels that FNMA's secondary market operation has proven economically sound and capable of being financed solely from private sources." U. S. Code Congressional and Administrative News p. 2943 (1968).

FNMA is not a non-profit corporation because dividends are paid on its stock, U. S. Congressional and Administrative News, p. 2945 (1968). Whether the secondary mortgage market is an essential governmental function is a nebulous question. Clearly the National Bank is an essential governmental function, *McCulloch v. Maryland*, 4 Wheaton 316, 4 L. Ed. 579 (1819).

The intent of congress seems patent that FNMA was to be a government-sponsored private corporation, intended to compete with other private corporations on a near equal basis, U. S. Congressional and Administrative News p. 2943 (1968). Now that FNMA is a government-sponsored private corporation, it has lost its identity with the United States Government for tax purposes, unless Congress has otherwise expressly exempted the corporation from taxation.

Congress provided FNMA with some tax immunity when the 1968 changes were made, i.e., 12 U. S. C. A. §1723a, which provides:

> "(2) The corporation (FNMA), including its franchise, capital, reserves, surplus, mortgages or other security holdings and income, shall be exempt from all taxation now or hereafter imposed by any state, territory, possession, commonwealth, or dependency of the United States, or by the District of Columbia, or by any county, municipality, or local taxing authority, except that any real property of the corporation shall be subject to state, territory, county, municipality, or local taxation to the same extent as other real property is taxed."

A close reading of this statute reveals what the intent and purpose of Congress was. They did not intend to exempt the income from stock or bonds held by individuals from taxation. The statute says "The corporation, including its . . . holdings and income shall be exempt." The import is that the corporation shall be exempt from taxation. A tax on the value of shares or the income therefrom held by an individual or another corporation is not a tax on FNMA.

From the foregoing, it seems apparent that the value and income from the stocks and bonds of FNMA held by individuals or other corporations are taxable by the state.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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30 October 1970

Subject: Taxation; Real Estate Excise Stamp Tax; Exemptions; Foreclosure Deed to Farmers Home Administration; G. S. 105-228.31

Requested by: Mr. Bobby Burns McNeill
Hoke County Attorney

Question: Is a trustee's deed to the Farmers Home Administration exempt from excise stamp tax on conveyances?

Conclusion: Farmers Home Administration is exempt from the excise stamp tax on conveyance.

A deed of trustee held by Farmers Home Administration was foreclosed, and that federal agency bid in the property and purchased at the foreclosure sale. The trustee made a deed to Farmers Home Administration, but the Clerk of Court refused to

register same because it bore no North Carolina revenue stamps. The question has thus arisen whether the deed, to Farmers Home Administration, must bear the stamps.

"The validity of state taxation of federal instrumentalities must depend on the power of congress to create the instrumentality and the intent of congress, as manifested by law, to protect it from, or to render it subject to, state taxation." 84 C. J. S. *Taxation* §207 p. 395. The intent of Congress is set out by statute in 7 U. S. C. A. §1984 which provides as follows:

> "All property subject to a lien held by the United States or the title to which is acquired or held by the Secretary under this chapter other than property used for administrative purposes shall be subject to taxation by State, territory, district, and local political subdivisions in the same manner and to the same extent as other property is taxed: *Provided, however, That no tax shall be imposed* or collected *on or with respect to any instrument* if the tax is based on. . .
>
> *(3) the value of any property vonveyed or transferred to the Secretary, whether as a tax on the instrument, the privilege of conveying or transferring or the recordation thereof*; nor shall the failure to pay or collect any such tax be a ground for refusal to record or file such instruments. . . ." (*Emphasis added.*)

The prohibition of this section is against a tax *on or with* respect to any instrument. The stamp tax is imposed upon the transfer by G. S. 105-228.31. Generally, according to an opinion of this office dated May 20, 1968, the imposition of a transfer tax upon conveyances of realty to government units or corporations is not prohibited unless the *transferor* is entitled to governmental immunity. In this particular case, however, the statute expressly

prohibits a tax on the instrument. Regardless of who pays the tax, the tax is still on the instrument, making the general rule inapplicable here. As a consequence, the conveyance to the Farmers Home Administration here is not subject to the real property excise stamp tax.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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5 November 1970

Subject: Social Services; Federal Social Security Act; Title XIX (Medicaid); Lack of Authority for the State to Pay More Than 50 Percent of the Non-Federal Share of Non-Administrative Program Costs.

Requested by: Mr. Clifton M. Craig, Commissioner
State Department of Social Services

Question: Is it lawful for more than 50 percent of the non-administrative program costs for the medical assistance program provided for by Part 5 of Chapter 108 of the General Statutes to be paid by the State instead of 50 percent by the State and 50 percent by the counties?

Conclusion: It is not lawful for more than 50 percent of the non-administrative program costs for the medical assistance program provided for by Part 5 of Chapter 108 of the General Statutes to be paid by the State instead of 50 percent by the State and 50 percent by the counties.

The conclusion stated above is based upon the "Special Provisions" of Chapter 807 of the Session Laws of 1969 which set forth the

requirements as to the payment of the costs of the non-federal share of the program costs referred to above and upon G.S. 143-16.

The pertinent part of Section 8 of Chapter 807 of the Session Laws of 1969 is as follows:

> "Funds appropriated herein to the State Department of Social Services and in the Special Reserve for the purpose of implementing Title XIX (Medicaid) effective January 1, 1970, are intended to provide for the following: . . . (f) . . .The non-federal share of the costs of administration in the Department of Social Services and the State Board of Health will be borne by the State. The non-federal share of payments in behalf of patients in mental and tuberculosis hospitals will be borne by the State. *The non-federal share of all other program costs will be divided equally between the State and counties.*" (*Emphasis added*)

G.S. 143-16 is as follows:

> "Every State department, bureau, division, officer, board, commission, institution, State agency, or undertaking, shall operate under an appropriation made in accordance with the provisions of this article; and no State department, bureau, division, officer, board, commission, institution, or other State agency or undertaking shall expend any money, except in pursuance of such appropriation and the rules, requirement and regulations made pursuant to this article."

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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5 November 1970

Subject: Labor; Fair Labor Standards Act; Applicability to Patients in State Mental Institutions

Requested by: Mr. G. Andrew Jones, Jr.
State Budget Officer

Question: Does the Fair Labor Standards Act apply to patients performing certain work projects in State mental institutions?

Conclusion: The Fair Labor Standards Act does not apply to patients in State mental institutions.

The question presented is whether or not the Fair Labor Standards Act applies to patients in the State's mental institutions who perform certain work while they are in admittance for treatment. As we understand the facts, this work generally has a therapeutic basis and is merely casual labor, although some patients work nearly full time as their mental health improves.

It is our opinion that the patients of the State's mental institutions are not "employees" within the intendment of the Fair Labor Standards Act. The Act is not, therefore, applicable to them, and the institutions involved are not required to pay these working patients the minimum wage required by the Act.

The Supreme Court of the United States has held that the application of the Fair Labor Standards Act (29 U.S.C. § 203 (s)(4)) to State hospitals and mental institutions is not an unconstitutional interference with State sovereignty. *Maryland v. Wirtz,* 392 U.S. 183, 20 L. ed. 1020, 88 S. Ct. 2017 (1968). That case was based upon the right of Congress to prevent labor disputes and strikes and, thereby, protect interstate commerce. It should be noted, however, that the Court expressly declined to rule upon the constitutionality of the Act under any fact situation other than the one at that time presented to the Court. Thus, the case is not controlling on the present fact situation.

Although State mental institutions are enterprises "engaged in commerce" within the definition of the Act, their patients are not

"employees" within the meaning of that Act. The definition of an "employee" under the Act "includes any individual employed by an employer." The definition of the term "employ" under the Act "includes to suffer or permit to work." As the Supreme Court of the United States has stated:

> "The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." *Walling v. Portland Terminal Co.,* 330 U.S. 148, 152, 91 L. ed. 809, 67 S. Ct. 639, 641 (1946); Accord, *Wirtz v. San Francisco and Oakland Helicopter Airlines, Inc.,* 370 F. 2d 328 (9th Cir., 1966).

It is our opinion that it would require a strained and frivolous interpretation of the Act in order to apply it to patients in State mental institutions. These patients have no effect on any form of labor relations or strikes. Further, their work-therapy does not affect interstate commerce in a manner which can reasonably be said to have been contemplated by the Congress when it passed the Act.

As the Supreme Court of the United States has made clear:

> "The determination of the (employment) relationship does not depend" upon "isolated factors but rather upon the circumstances of the whole activity."*Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730 91 L. ed. 1772, 1778, 67 S. Ct. 1473 (1947); Accord, *Gulf King Shrimp Co. v. Wirtz,* 407 F. 2d 508 (5th Cir., 1969).

Applying the "whole activity" test to State mental institutions, it seems clear that no employer-employee relationship exists between the institution and its patients. Rather, the work performed by patients is a part of their treatment with both hours and complexity of work increasing as their mental health improves.

It is our opinion that an application of the Fair Labor Standards

Act to the treatment situation here involved would raise a grave constitutional issue of interference by the Congress with the State's right to protect the health and welfare of its citizens. The case of *Maryland v. Wirtz, supra,* does not provide a persuasive argument in favor of the powers of Congress here and, in fact, expressly leaves the question open for later determination.

Should a Court hold that the Fair Labor Standards Act is applicable to patients in mental institutions, other problems would immediately arise. The Supreme Court of the United States has held that decisions defining the coverage of the employer-employee relationship under one Federal Act are persuasive in the consideration of similar coverage under another Federal Act. *Rutherford Food Corp. v. McComb, supra.*

The Courts would, therefore, presumably be called upon to determine whether or not patients in private mental institutions have the right to organize and bargain collectively with the mental institutions under the mandate of the National Labor Relations Act, and whether or not the Social Security Act applied to such patients. It is difficult to believe that any Court would so stretch the definition of "employee" as to bring patients in mental institutions under any of the federal acts mentioned.

It is, therefore, our opinion that patients in mental institutions are not "employees" within the intendment of the Fair Labor Standards Act. Although the State may choose to pay its patients in mental institutions an amount equal to the minimum wage required by the Fair Labor Standards Act, the said Act does not require that they be paid any minimum wage for their work-therapy.

It should be noted, however, that authoritative interpretations of federal acts are the province of federal officials. Further, a conclusive construction of any federal act may only be provided by the federal courts.

Robert Morgan, Attorney General
Burley B. Mitchell, Jr.,
Staff Attorney

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5 November 1970

Subject: Municipalities; Streets and Highways; Truck Routes.

Requested by: Mr. James B. Garland
Assistant Gastonia City Attorney

Question: As to streets not on the State Highway System, do municipalities have the authority to restrict their use by vehicular traffic by establishing truck routes and maximum axle weights prohibiting the use of certain streets by trucks.

Conclusion: As to streets not on the State Highway System, municipalities may by reasonable ordinances restrict their use by vehicular traffic by establishing truck routes and maximum axle weights prohibiting the use of certain streets by trucks.

G.S. 20-116 (h) grants to the State Highway Commission the authority to make such regulations with respect to highways on the State Highway System. It has no application to non-system streets.

Several statutes authorize municipalities to regulate traffic upon their streets.

G.S. 160-200 (11) authorizes a municipality to "adopt such ordinances for the regulation and use of the streets ... as it may deem best for the public welfare of the citizens of the city."

G.S. 160-200 (31) authorizes municipalities "To provide for the regulation, diversion and limitation of ... vehicular traffic upon public streets, highways and sidewalks of the city."

G.S. 160-222 authorizes municipalities to "control" their streets "and regulate and control the use thereof by ... vehicles."

By N.C.A.G. Opinion dated 12/16/53 to Henry C. Doby, Attorney, Albemarle, N.C., this office has ruled that municipalities may restrict

the use of their streets by vehicle weight provided their ordinances are reasonable.

In *Genes, Inc. v. Charlotte,* 259 N.C. 118 (1963), our Supreme Court recognizes the authority of a municipality to "adopt such ordinances for the regulation and use of its streets as it deems best for the public welfare of its citizens and to provide for the regulation and diversion of vehicular traffic upon its streets".

Truck routes are a commonly employed method of regulation and diversion of vehicular traffic in most urban areas.

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

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5 November 1970

Subject: Taxation; Ad Valorem; Personal Property Exempt; Imported Products Stored in Warehouse; Import-Export Clause, Article I, Section 10, Clause 2, of the United States Constitution

Requested by: Mr. F.L. Carr
Wilson County Attorney

Question: Whether imported meat products, stored by their owner in the original packages in a public warehouse for the purpose of supply in such owner's food processing business, are exempt from the ad valorem tax of the county where stored by virtue of the Import-Export Clause, Article I, Section 10, Clause 2, of the United States Constitution when the owner, from time to time, withdraws portions of such products from the warehouse as needed and carries such portions withdrawn to its plant in an adjoining county where they are converted into retail food?

Conclusion: Imported meat products, stored by their owner in the original packages in a public warehouse for the purpose of supply in such owner's food processing business, are not exempt from the ad valorem tax of the county where stored by virtue of the Import-Export Clause, Article I, Section 10, Clause 2, of the United States Constitution when the owner, from time to time, withdraws portions of such products from the warehouse as needed and carries such portions withdrawn to its plant in an adjoining county where they are converted into retail food.

The Import-Export Clause, Article I, Section 10, Clause 2, of the United States Constitution provides as follows:

> "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress."

The United States Supreme Court in interpreting the purpose of this constitutional prohibition stated in the landmark case of *Brown v. Maryland,* 12 Wheat (U.S.) 419, 6 L. ed. 678 (1827), that the design of the constitutional immunity was to prevent "the great importing States" from laying "a tax on the non-importing States" which "would necessarily produce countervailing measure on the part of those states whose situation was less favorable to importation." While holding that the provisions of this Clause intended to confer on the national government the exclusive power to tax imports or the act of importation, the Court stated, through the words of Chief Justice Marshall, that "there must be a point of time when the prohibition ceases, and the power of the state to tax commences". The Supreme Court then stated:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state."

After reviewing the language of Chief Justice Marshall in *Brown v. Maryland,* the United States Supreme Court has more recently stated in the case of *Youngstown Sheet & Tube Co. v. Bowers,* 358 U.S. 534, 3 L. ed. 2d 490 (1959), as follows:

> "The constitutional design was then to immunize imports from taxation by the importing States, and all others through or into which they may pass, so long as they retain their distinctive character as imports. Hence, that design is not impinged by the taxation of materials that were imported for use in manufacturing after all phases of the importation definitely have ended and the materials have been 'put to the use for which they were imported' (*Hooven & A. Co. v. Evatt, supra,* 324 U.S. at 657) for in such a case they have lost their distinctive character as imports and are subject to taxation."

In the *Youngstown Sheet & Tube Co.* case, the taxpayer was importing ores for use in its manufacturing process and was placing the ore in yards adjacent to its plant, from where the ore was then transferred to stock bins closer to the plant and from there fed into the furnaces. The Court in this case held that not only the ore in the stock bins but also the ore in the yards some distance from the plant was "irrevocably committed to use" in the manufacturing process of the taxpayer and had thus lost its character as an import and its immunity from state taxation. The Supreme

Court has thus held in the case of *Youngstown Sheet & Tube Co.* and in the case of *United States Plywood Corp. v. City of Algoma,* reported with the *Youngstown* case, that where stockpiles of imported materials were regularly kept on hand, and indiscriminate portions were continuously drawn upon for the purpose of meeting current requirements of the manufacturing process, they were thereby committed to use and lost their status as imports and thus were subject to the state and local taxing powerr. Kauper, Constitutional Law Cases and Materials, p. 351.

The Supreme Court in the *Youngstown Sheet & Tube Co.* case stated that the ores in question were "not only needed, imported, and irrevocably *committed to supply,* but were actually being used *to supply*" the requirements of the plant. *(Emphasis added).* The Court then concluded this case as follows:

> "The materials here in question were *imported to supply,* and were essential to supply, the manufacturer's current operating needs. When, after all phases of their importation had ended, they were put to that use and *indiscriminate portions of the whole were actually being used to supply daily operation needs*, they stood in the same relation to the State as like piles of domestic materials at the same place that were kept for use and used in the same way. The one ws then as freely subject to taxation as the other. In those circumstances, the tax was not on 'imports', nor was it a tax on the materials because they had been imported, but because at the time of the assessment they were being used, in every practical sense, for the purposes for which they had been imported. They were therfore subject to taxation just like domestic property that was kept at the same place in the same way for the same use."*(Emphasis added).*

In the *United States Plywood Corp.* case, the further question was presented as to whether the bundles of plywood retained tax immunity while held in storage to meet current operating needs since the "original package" was not broken until the plywood was put into the daily manufacturing operations of the plant. The Court held that this was immaterial. Kauper, Constitutional Law Cases and Materials, p. 351. In this regard the Court stated:

> "Whatever may be the significance of retaining in the 'original package' goods that have been so imported for sale ... (citing cases), goods that have been so imported for use in manufacturing are not exempt from taxation, though not removed from the 'original package', if, as found here, they have been 'put to the use for which they were imported.' ... Breaking the original package is only one of the ways by which packaged goods that have been imported for use in manufacturing may lose their distinctive character as imports. Another way is by putting them 'to the use for which they were imported'."

Likewise the Supreme Court held in the *Youngstown Sheet & Tube Co.* case that the distance of the storage site from the place of actual manufacture was not controlling. In this regard the Court stated:

> "'Reconciliation of the competing demands of the constitutional immunity and of the state's power to tax being an extremely practical matter' *(Hooven & A. Co. v. Evatt, supra*, 324 U.S. at 668), taxability cannot depend upon whether the size of the pile of stored materials or its distance from the place of actual fabrication or consumption is a little more or a little less."

Therefore, products which are imported and committed to supply and which are actually being used to supply the current manufacturing needs of their owner are not immune to taxation under the Import-Export Clause of the United States Constitution and are thus subject to state and local taxation notwithstanding the fact such products may be stored for such use in the original package.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.
Assistant Attorney General

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9 November 1970

Subject: Infants & Incompetants; Sterilization, Sterilization of Unmarried Minors Under G.S. 90-272; Sterilization Under Article 7 of Chapter 35.

Requested by: Mr. William W. Aycock, Jr.
Attorney for Edgecombe County Department of Social Services.

Questions: (1) May a district court exercising juvenile jurisdiction order the sterilization of a feebleminded or mentally diseased unmarried minor provided the pertinent provisions of G.S. 90-271 and the provisions of G.S. 90-272 have been complied with, including the necessary request by such minor for sterilization?

(2) Is it necessary to have a guardian appointed to represent a feebleminded or mentally diseased unmarried minor in the district court when the court's approval for sterilization of such minor is being sought under G.S. 90-272 and the pertinent provisions of G.S. 90-271?

Conclusion: (1) If an unmarried person under the age of 21 years is "feebleminded" or "mentally diseased" in the sense that he or she is impaired or deficient mentally to a sufficiently slight extent that he or she can understand the nature, scope and extent, or nature and consequences of his or her act in requesting sterilization, the district court may authorize the sterilization of such person provided that the provisions of G.S. 90-272 and the pertinent provisions of G.S. 90-271 have been complied with including the request by such minor for sterilization and the filing of the necessary petition with the court by "the parent or parents if they be living, or the guardian or next friend of such minor."

(2) In the case of a mentally diseased or feeble minded unmarried minor who has sufficient mental capacity to make a valid written request for sterilization under the provisions of G.S. 90-272, there is no necessity for the appointment of a guardian for the child in the proceeding for obtaining the district court's approval for sterilization, except as may be required by an excerpt from G.S. 90-272 as follows: "provided that the juvenile court of the county wherein such minor resides upon petition of the parent or parents, if they be living, or the guardian or next friend of such minor, shall determine that the operation is in the best interest of such minor. . ."

Alluding to Conclusion No. 1, in the case of *McKay v. Cameron,* 231 N.C. 655, the Court quoted with approval an excerpt from the case of *Sprinkle v. Wellborn,* 140 N.C. 163, which is, in pertinent part, as follows:

> "We have said in *Cameron v. Power Co.,* 138 N.C. 365, which sustains the charge of the court, that this Court has adopted Coke's definition, that a person has mental capacity sufficient to

> contract if he knows what he is about (*Moffit v. Witherspoon,* 32 N.C. 185; *Paine v. Roberts,* 82 N.C. 451), and that the measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not that he should be able to act wisely or discreetly. . ."

No reason is perceived why sufficient mentality to execute a contract would not be sufficient mentality to make a valid written request for sterilization. Again, it is emphasized, as in the conclusion stated above, that it is not the intent of this opinion to indicate that only the request of the unmarried minor will suffice to authorize sterilization but rather that all the provisions of G.S. 90-272 and the pertinent provisions of G.S. 271 must be complied with. Also, it is surmised that in the case of a mentally impaired or mentally deficient unmarried minor the judge will want to satisfy himself that the child does in fact have the ability to understand the nature and consequences of his act in requesting sterilization.

Of course, if a person has been judicially declared incompetent or if he has not sufficient mentality to understand the nature and consequences of his act in requesting sterilization, it is recognized that it would be appropriate to proceed under the provisions of Article 7 under Chapter 35 of the General Statutes entitled "Sterilization of Persons Mentally Defective" and, of course, it is recognized that a petitioner *may* proceed under the provisions of Article 7 of Chapter 35 of the General Statutes in any case in which the person to be sterilized is mentally diseased, mentally disordered, mentally ill, or mentally defective within the meaning of G.S. 35-1.1 since it appears that the definitions stated therein are applicable wherever the defined words are used in Chapter 35 of the General Statutes.

Alluding to Conclusion No. 2, it appears that it is the sense of G.S. 90-272 that it contains its own special provisions for the protection of the minor to be sterilized and, therefore, that it is not necessary that the court take any action with regard to the appointment of a guardian or guardian ad litem under any other provisions of law including G.S. 1A-1, Rule 17 (b)(1) and (2) pertaining to guardians

ad litem for infants and incompetents.

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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16 November 1970

Subject: Indians; Eastern Band of Cherokee Indians; Federal Grant-in-Aid Funds; Authorizing Governmental Agency

Requested by: Mr. Elbert L. Peters, Jr., Coordinator
Governor's Highway Safety Program

Question: Does the "Eastern Band of Cherokee Indians" constitute an "authorizing governmental agency" for an application to secure grant-in-aid funds to implement a proposed project in the functional area of emergency medical services?

Conclusion: There is nothing in the laws of North Carolina which would preclude the Eastern Band of Cherokee Indians from acting in the capacity of an authorizing governmental agency in applying for grant-in-aid funds in the functional area of emergency medical services.

The Eastern Band of Cherokee Indians serves all the functions of a city or town for some 7,000 people on the Cherokee Reservation. The Eastern Band of Cherokee Indians was created and constituted a body politic incorporate by Chapter 211 of the 1889 Private Laws of North Carolina. It provides a wide variety of services to its citizens by and through a legislative Tribal Council and its executive principal chief. It operates and maintains a water and sewer system, provides social services for the infirm and underprivileged, provides police and fire protection, holds elections and referendums, provides for job training, self-help housing, enacts and enforces plumbing,

electrical and housing codes and generally attempts to promote the health, safety, education and welfare of its citizens.

The project application proposed by the Eastern Band of Cherokee Indians would seek federal funds available through the Highway Safety Act of 1966.

Funds to implement this project would total approximately $26,000 and would be shared equally by the federal government and the political subdivision (Eastern Band of Cherokee Indians).

All equipment would be purchased by and titled to the Eastern Band of Cherokee Indians and leased to the Cherokee Rescue Squad in the same manner that equipment is titled to city or county governmental units and leased to the various other rescue squads throughout the State of North Carolina.

The Cherokee Rescue Squad furnishes the only ambulance service to the residents of the Cherokee Indian Reservation and to a substantial portion of the Great Smoky Mountains National Park to which some 6,000,000 visitors come annually. As this rescue squad ambulance can pick up accident victims and be at the hospitals of the nearby towns before commercial ambulances can reach the scene of the accident within the Park boundaries, ambulance service is furnished by the Cherokee Rescue Squad to this wide area of western North Carolina without compensation.

The Eastern Band of Cherokee Indians is unique in that it is a body politic under the laws of North Carolina and at the same time is recognized as an Indian Nation by the United States. For the purposes set out hereinabove, however, the Eastern Band of Cherokee Indians is the governing authority for all the area encompassed within the boundaries of the Cherokee Indian Reservation.

For legislative enactments affecting the Eastern Band of Cherokee Indians, see Chapter 211, Private Laws of North Carolina 1889, Chapter 166, Private Laws of North Carolina 1895, Chapter 207, Private Laws of North Carolina 1897, Chapter 128, Private Laws of North Carolina 1931, Chapter 39, Private Laws of North Carolina 1933, and Chapter 978, 1947 Session Laws.

For historical background of the Eastern Band of Cherokee Indians, see *United States v. Wright, et al,* 53 Fed. Rep. 2d 300, and *Halie v. Saunooke,* 246 Fed. 2d 293.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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16 November 1970

Subject: Motor Vehicles; Speed Limits; City Ordinances; G. S. 20-141(f)(1) and 20-141(b)

Requested by: Mr. James B. Garland
Assistant Gastonia City Attorney

Question: Is a municipal ordinance limiting speed to 35 miles per hour in residential zones, pursuant to G. S. 20-141(f)(1), on nonsystem streets enforceable when signs have not been conspicuously placed giving notice thereof since the speed limit established by G. S. 20-141(b) has not been changed?

Conclusion: Unless signs have been conspicuously placed giving notice of the speed limit for such streets, the ordinance would not be effective. However, the ordinance would not affect the applicability of G. S. 20-141(b) and violations could be charged pursuant thereto.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

8 November 1970

ubject: Taxation; Real Estate Excise Stamp Tax; Foreclosures; Government Instrumentalities; Veterans Administration

Requested by: Mrs. Lois C. LeRay
Register of Deeds
New Hanover County

Questions:

(1) Is the sale of real property by a mortgagee or trustee in a deed of trust under a power of sale or by foreclosure, a conveyance subject to the excise stamp tax on conveyances?

(2) Is the sale of real property by the Veterans Administration, as trustee of a deed of trust, to itself as the highest bidder at a foreclosure sale subject to the excise stamp tax on conveyances?

Conclusions:

(1) The sale of real property by a mortgagee, or trustee in a deed of trust, under a power of sale or by foreclosure, is a conveyance subject to the excise stamp tax on conveyances.

(2) The sale of real property by the trustee of a deed of trust, to the Veterans Administration (beneficiary), as the highest bidder at a foreclosure sale is subject to the excise stamp tax on conveyances.

The Veterans Administration has foreclosed on certain real property. At the foreclosure sale, the Veterans Administration was the highest bidder. A controversy has arisen as to whether the conveyance is subject to the excise stamp tax on conveyances.

The first question that must be answered is whether the sale of real property by a mortgagee, or trustee in a deed of trust, is a

conveyance subject to the excise stamp tax on conveyance. G. S. 105-228.28 provides:

> The provisions of this article shall apply to every person, firm, corporation, association, society or organization *conveying an interest in real estate located in North Carolina other than a governmental unit and instrumentalities thereof. (Emphasis added.)*

G. S. 105-228.29 provides:

> The provisions of this article shall not apply to transfers of an interest in real estate by operation of law, by lease for a term of years, by or pursuant to the provisions of a will, by intestacy, by gift, by merger or consolidation, or *by instruments securing indebtedness*, or any other transfer where no consideration in property or money is due or paid by the transferee to transferor. *(Emphasis added.)*

In North Carolina the legal title to real property passes to the mortgagee, or trustee of a deed of trust, when the instrument is properly executed. In *Bank of Onslow v. Rowland Lumber Company,* 193 N. C. 757 at 760, (1927), the Court said:

> "The legal title to property . . . conveyed by a mortgage deed, passes to and vests in the mortgagee, who holds the same, however, for the purposes of security. . . . The equitable or beneficial title remains in the mortgagor, who, as to all persons except the mortgagee, is considered the true owner of the property. With respect to the property conveyed to him as security, the mortgagee has such rights only as are required for the protection of his security, and it is for this reason he is considered the holder of legal title."

In *Simms v. Hawkins*, 1 N. C. App. 168 at 169-170, (1968), the Court said:

> "Upon the execution of a mortgage or deed of trust on real estate, legal title vests in the mortgagee or trustee, as the case may be, but only as security for the payment of the debt.
>
> "The estate of a mortgagee, or trustee in a deed of trust, is a defeasible fee terminating the instant the debt is paid or other condition of the mortgage or deed of trust is performed."

Accord, *Gregg v. Williamson*, 246 N. C. 356 (1957); and *Hemphill v. Ross*, 66 N. C. 477 (1872).

"A mortgage is a conveyance by the debtor to his creditor or to some one in trust for him as security for a debts," *Walston v. Twiford*, 248 N. C. 691 at 693 (1958). The primary purpose of the mortgage or deed of trust is to create a security relationship, title being only an ancillary consideration in practice. But North Carolina follows the common law rule where the mortgagee or trustee holds title to the property, *Simms v. Hawkins, supra; Gregg v. Williamson, supra*; and *Stevens v. Turlington*, 186 N. C. 191 (1926). While the making of the mortgage or deed of trust is a conveyance of an interest in real property within the purview of G. S. 105-228.28, it is excluded by G. S. 105-228.29 which excludes "instruments securing indebtedness" from the operation of the tax.

As between the mortgagor and the mortgagee, or trustee in a deed of trust, the legal title remains in the mortgagee or trustee until the land is redeemed or the mortgage foreclosed or sold under a power of sale. *Alexander v. Virginia-Carolina Joint Stock Bank and Southern Trust Company*, 201 N. C. 449 (1931); *Stevens v. Turlington*, 186 N. C. 191 (1926). When the mortgage or deed of trust is foreclosed or sold under a power of sale, the fee in the mortgagee or trustee becomes indeterminable and indefeasible. Consequently when the mortgagee or trustee forecloses or makes a sale under a power of sale, there is a conveyance of legal title from the mortgagee or trustee to the purchaser. This conveyance is a conveyance of an interest in real property within the purview of G. S. 105-228.28, and is not excluded under G. S. 105-228.29. Therefore, the conveyance is subject to the excise stamp tax on

conveyances unless otherwise excepted.

When the mortgagee or beneficiary of a deed of trust, buys in a the foreclosure sale, a conveyance of title takes place. Th conveyance of title is from the mortgagee or trustee, in the fiduciary capacity to the mortgagee or beneficiary in their individua or corporate capacities. The conveyance, unless otherwise exceptec is within the purview of G. S. 105-228.28 and therefore subjec to the tax (*Charlestown Five Cents Savings Bank v. White Commissioner of Revenue*, 30 F. Supp. 416, 24 A.F.T.R. 17 (1939)). In the *Charlestown* case, the Court noted:

> "That the transfer to the plaintiff is for consideration of value cannot be denied. When the plaintiff bought at the foreclosure sale and gave a deed to itself, it ended the equity of redemption of the mortgagor, and became responsible for the application of the purchase price as though it had received it upon a foreclosure sale to a stranger, and it was bound to apply it to the payment of the mortgage debts." (At F. Supp. 418-419, A.F.T.R. 175-175.)

Accord, *Railroad Federal Savings and Loan Association v. Unitec States*, 135 F. 2d 290, 30 A.F.T.R. 1425 (1943).

The second question which has arisen is whether a conveyance by a trustee to the Veterans Administration (beneficiary in the deec of trust), as the highest bidder at the foreclosure sale, is subjec to the excise stamp tax on conveyances, the objection to the tax being that the Veterans Administration is "a governmental unit" or an "instrumentality thereof", i.e., the federal government, and is therefore, exempt from taxation under G. S. 105-228.28. As noted in the opinion of this office of May 20, 1968, the excise stamp tax on conveyances is imposed upon the transferor and exemption therefrom depends upon the nature of the transferor and not the transferee. Transfers to governmental agencies or instrumentalities are subject to the tax unless the transferor is in an exempt category.

he Veterans Administration is a governmental unit or istrumentality within the purview of G. S. 105-228.28. 38 .S.C.A. 201 provides:

> "*The Veterans Administration is an independent establishment in the executive branch of the government,* especially created for and concerned in the administration of laws relating to the relief and other benefits provided by law for veterans, their dependents, and their beneficiaries. Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1114." (*Emphasis added.*)

ut the transferor in the present case is not the Veterans dministration but an individual acting as an individual trustee even ough he may be an employee of the Veterans Administration. herefore, in accord with the opinion of this office of ay 20, 1968, the conveyance in the present case is subject to the cise stamp tax on conveyances.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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3 November 1970

ubject: Motor Vehicles; Drunken Driving; Riding a Horse on Street or Highway While Intoxicated

equested by: Honorable J. Ray Braswell
Chief District Judge
24th Judicial District

uestions: (1) Does a warrant charging ". . . the defendant named above did unlawfully, willfully ride a horse upon the public

highways of the State while under the influence of intoxicating liquor, to wit: at approximately 8:45 p.m. on Highway N. C. 194 in Avery County. The offense charged here was committed against the peace and dignity of the State and in violation of law, G. S. 20-138" charge a criminal offense? If so, would the defendant be subject to the penalty provisions of the law providing a minimum fine of $100.00 and revocation of his operator's license?

(2) Does a warrant charging ". . . the defendant named above did unlawfully willfully resist S. A. Isenhour, a public officer holding the office of N. C. Highway Patrolman, by refusing to get off his horse telling the officer he would have to knock him off, and by running away and causing the horse to kick at the said officer. At the time, such officer was attempting to discharge the duty of his office, to wit: the duty of arresting Edward Spencer Blackburn for riding a horse while under the influence of intoxicating liquor. The offense charged here was committed against the peace and dignity of the State and in violation of law. G. S. 14-223" charge a criminal offense?

Conclusions: (1) The warrant charges a criminal offense and the punishment provisons of G. S. 20-179 would be applicable.

(2) It would appear that this warrant should be amended to read, ". . . to wit: the duty of arresting Edward Spencer Blackburn for riding a horse *upon a highway within the State* while under the influence of intoxicating liquor . . ."

ith regard to Conclusion 1, G. S. 20-138 provides:

> "§ 20-138. *Persons under the influence of intoxicating liquor or narcotic drugs.*--It shall be unlawful and punishable, as provided in § 20-179, for any person, whether licensed or not, who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this State."

. S. 20-38(38) provides:

> "(38) Vehicles.--Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this article bicycles shall be deemed vehicles, and every rider of a bicycle upon a highway shall be subject to the provisions of this article applicable to the driver of a vehicle except those which by their nature can have no application."

. S. 20-171 provides:

> "§ 20-171. *Traffic laws apply to persons riding animals or driving animal-drawn vehicles.*--Every person riding an animal or driving any animal drawing a vehicle upon a highway shall be subject to the provisions of this article applicable to the driver of a vehicle, except those provisions of the article which by their nature can have no application."

ith regard to Conclusion 2, I am of the opinion the "resisting rest" warrant if amended as indicated, would charge a criminal fense. The charge must set out the official duty the named officer

was discharging or attempting to discharge.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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24 November 1970

Subject: Taxation; Intangibles Tax; Accounts Receivable Periodic Billings by Construction Company Evidence of Debt

Requested by: Mr. A. R. Waters, Director
Intangibles Tax Division
North Carolina Department of Revenue

Question: Whether monthly or periodic billings by construction company, which billings ar outstanding and due as of December 31, shoul be reported for intangibles tax purposes a "accounts receivable" under G. S. 105-201 or a "evidences of debt" under G. S. 105-202?

Conclusion: Monthly or periodic billings for work complete by a construction company, which billings ar outstanding and due as of December 31, shoul be reported for intangibles tax purposes a accounts receivable under G. S. 105-201.

Periodic billings for work completed by a construction compan would appear to fall more appropriately within the purview o G. S. 105-201, whereas it would appear that G. S. 105-202 relate more appropriately to instruments held for money loaned, deposite or invested. The term "evidence of debt", as opposed to a bill o statement for service rendered, is defined in Black's Law Dictionary 4th Ed., as "a term applied to written instruments or securities fo the payment of money, importing on their face the existence o

a debt", and this appears to be the sense or meaning intended by the Legislature in its adoption of G. S. 105-202. Unlike a written instrument or security which acknowledges upon its face the existence of a debt, a bill or statement submitted for a service rendered is merely a demand or request for payment and contains therein no acknowledgment by the recipient of the existence of any debt. Furthermore, the Intangibles Tax Division of the North Carolina Department of Revenue has administratively held for a number of years that periodic billings by construction companies should be classified as accounts receivable and reported under G. S. 105-201. This long-standing administrative interpretation of G. S. 105-201 to include periodic billings by construction companies is indicative of the legislative intent and the correctness of such interpretation. "An administrative interpretation of a tax statute which has continued over a long period of time with the silent acquiescence of the Legislature should be given consideration in the construction of the statute." *Yacht Co. v. High, Commissioner of Revenue*, 265 N. C. 653, 144 S.E. 2d 821.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.
Assistant Attorney General

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24 November 1970

Subject: Courts; Publications; Ownership of Publications Distributed under G. S. 147-45 or Court Facility Fees to Officials and Agencies.

Requested by: Honorable J. Russell Nipper
Clerk of Superior Court
Wake County

Question: Do law books furnished to judges and solicitors by the state, county or municipality belong to the office or to the individuals?

Conclusion: The publications required to be distributed by the

Secretary of State to superior court judges and solicitors pursuant to G. S. 147-45 belong to the office and not to the individual who holds the office. The books are furnished at State expense and the ownership is in the State. In those instances where a county or municipality has purchased books for a law library with facilities fees, as authorized by G. S. 7A-304, et seq., the books would belong to the purchasing county or municipality. The reports in the clerk's office must remain in the custody of the clerk as provided in G. S. 147-51.

There appears to be no provision of law which indicates that judges or solicitors of superior court have any ownership in those books furnished by the State, county or municipality. Of course these officials are entitled to the unrestricted use of such books during their term of office.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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24 November 1970

Subject: Administration of Estates; Wills; Attestation; Attestation Clause Not Required for Probate.

Requested by: Honorable Louise S. Allen
Clerk of Superior Court
Washington County

Question: May a will offered for probate be probated as an attested written will under the provisions of G. S. 31-3.3, if the attestation clause is omitted from the will?

Conclusion: Yes. While North Carolina has not ruled on this

> question, in the absence of a specific statutory requirement, as in North Carolina, most jurisdictions do not require the presence of an attestation clause in the will itself.

The following will was offered for probate:

> "North Carolina
>
> Washington County Cresnell
>
> I David Furlough of Said State and County do here make and declare this my last will and testament I give devise and bequeath to my beloved wife Annie Phelps Furlough all of my property real and personal of every kind and description and do also appoint her as the executer of my estate
> Witness my hand an seal this 17th day of November 1965
>
> David Furlough
>
> H. P. Barnes
> Essie D. Barnes"

The Clerk determined that the body of the will was in the handwriting of Mrs. David Furlough. The testator David Furlough, signed the will which signature was witnessed by H. P. Barnes and Essie D. Barnes who then subscribed their names to the will. The will contains no attestation clause. An "attestation clause" is "In wills. A certificate certifying as to facts and circumstances attending execution of will. *In re Bragg's Estate*, 106 Mont. 132, 76 P2d 57, 62." Black's Law Dictionary Fourth Ed., p. 163. North Carolina statutes do not define an "attestation clause".

The following appears in 94 C.J.S., Wills, sec. 183, p. 993:

> "While at common law it is not essential to the validity of a will that it should be attested or subscribed by witnesses, in most jurisdictions attestation and subscription by witnesses are, by statute, made

> essential to the validity of wills of both real and personal property."

Among the cases cited are *Paul v. Davenport*, 217 N. C. 154, 7 S. E. 2d 352 (1940). This case was decided under C. S. sec. 4131, which was, in part, as follows:

> "No last will or testament shall be good or sufficient, in law, to convey or give any estate, real or personal, unless such last will shall have been written in the testator's lifetime, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, ..."

C.S. 4131 does not use the word "attest" or "attestation". *Paul v. Davenport, supra*, referring to C.S. 4131, states at p. 157, "But the statute expressly requires that the will shall be subscribed in the presence of the testator by two witnesses at least." The opinion does not mention "attestation" or "attestation clause". Therefore *Paul v. Davenport, supra*, does not support the quote above from 94 C.J.S.

C.S. 4131 was brought forward in the General Statutes of North Carolina as 31-3. G. S. 31-3 was rewritten by the 1953 General Assembly, Chapter 1098, and the present G. S. 31-3.3 has remained unchanged since that time. The word "subscribed" has been dropped. The word now used is "attested". The following is Black's Law Dictionary, 4th Ed., definition of "attest":

> "To bear witness to; to bear witness to a fact; to affirm to be true or genuine; to act as a witness to; to certify; to certify to the verity of a copy of a public document; formally by signature; to make solemn declaration in words or writing to support a fact; to signify by subscription of his name that the signer has witnessed the execution of the particular instrument."

While G. S. 31-3.3 does require the witnesses to "attest" the testator's signature, there is no specific requirement that such attestation must be by a formal clause in the will itself. Subsection

(d) merely requires that "The attesting witnesses must *sign* the will in the presence of the testator . . ." (*Emphasis added.*)

It appears that "attest" as used in G. S. 31-3.3 is used in the sense of "subscribed" in C. S. 4131.

There appears to be no conflict of authority as to whether the attestation clause must, in the absence of specific statutory requirement (as here), appear in the will itself. California, Delaware, Georgia, Iowa, Maryland, Michigan, Missouri, New Mexico, New York, North Dakota, Ohio and Virginia have specifically held that the attestation clause need not be in the will itself. 94 C.J.S., Wills, sec. 196, ftn. 75, p. 1034. See also, to the same effect, 57 Am. Jur., Wills, sec. 296, p. 227, citing cases. Several other states have, by statute, required the attestation clause to be a part of the will. See 94 C.J.S., Wills, sec. 183.

The writer has found no North Carolina court decision in point.

It is strongly recommended that a sworn statement, substantially in the form of a typical "attestation clause", be obtained from the two subscribing witnesses prior to the order of probate by the Clerk and filed as a part of the probate.

Robert Morgan, Attorney General
Millard R. Rich, Jr.,
Assistant Attorney General

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30 November 1970

Subject: Social Services; Adoption of Minors; Venue; Waiver of Venue; Removal of Proceedings from One County to Another.

Requested by: Mrs. Joan C. Holland,
Supervisor of Adoptions
Department of Social Services

Questions: (1) May the venue requirements of G. S. 48-12 pertaining to adoptions be waived by the failure of any person to object to improper venue or otherwise?

(2) If an adoption proceeding is begun in a county other than one of those specified in G. S. 48-12 pertaining to venue and adoption proceedings, should the adoption proceeding be dismissed or may the proceeding be removed to the appropriate county without beginning the proceeding anew?

Conclusions: (1) The venue requirements of G. S. 48-12 pertaining to adoptions may not be waived by the failure of any person to object to improper venue or otherwise.

(2) If an adoption proceeding is begun in a county other than one of those specified in G. S. 48-12 pertaining to venue in adoption proceedings, the adoption proceeding should be dismissed since it cannot lawfully be removed to another county without beginning the proceeding anew.

The statutes considered in arriving at the conclusions stated above are G. S. 48-12, G. S. 1-1, G. S. 1-2, G. S. 1-3, and G. S. 1-83.

G. S. 48-12 is as follows:

"Nature of proceeding; venue.--Adoption shall be by a special proceeding before the clerk of the superior court. The petition may be filed in the county:

(1) Where the petitioners reside; or
(2) Where the child resides; or
(3) Where the child resided when it became a public charge; or

(4) In which is located any licensed child placing agency or institution operating under the laws of this State and having custody of the child or to which the child shall have been surrendered as provided in G. S. 48-9."

G. S. 1-1 is as follows:

"Remedies.--Remedies in the courts of justice are divided into--

(1) Actions.
(2) Special proceedings."

G. S. 1-2 is as follows:

"Actions.--An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense."

G. S. 1-3 is as follows:

"Special proceedings.–Every other remedy is a special proceeding."

G. S. 1-83 is as follows:

"Change of venue.–If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time for answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

(1) When the county designated for that purpose

> is not the proper one. (2) When the convenience of witnesses and the ends of justice would be promoted by the change. (3) When the judge has, at any time, been interested as party or counsel. (4) When motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons."

In the case of *In Re Holder* 218 N.C. 136 (1940), the North Carolina Supreme Court stated that an adoption proceeding "is in derogation of the common law and must be strictly construed."

From a consideration of G. S. 1-1, G. S. 1-2, G. S. 1-3, and G. S. 48-12, it appears that an adoption proceeding is a "special proceeding" as distinguished from a "civil action", and G. S. 1-83 appears to pertain to civil actions rather than special proceedings. G. S. 48-12 contains special venue provisions relating to the adoption of minors. Despite the use of the word "may" in G. S. 48-12, the venue provisions set forth therein are deemed to be mandatory in the absence of any provisions of law to the contrary. Otherwise, there would be no need to specify in which of several counties the proceeding may be begun. The cases which have been found that state that venue may be waived and that, in case of improper venue, the action should be removed rather than dismissed involve civil actions rather than special proceedings, and in some cases they are interpretative of statutes which are substantially the same as the present G. S. 1-83. No provision of law to the contrary having been found and, specifically, it appearing that G. S. 1-83 relates to civil actions and not to a special proceeding for adoption of a child, the provisions of G. S. 48-12 are deemed to be mandatory and jurisdictional despite the use of the word "venue" in the caption thereof. Hence the conclusions stated above.

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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3 December 1970

Subject: Administration of Estates; Intestacy; Distribution of Intestate's Estate Among Brothers and Sisters and Their Legal Descendants

Requested by: Honorable R. J. White, Jr.
Clerk of Superior Court
Northampton County

Question: When a North Carolina resident dies intestate, not survived by spouse or lineal descendants, what are the respective shares of the brothers and sisters and their lineal descendants in the estate?

Conclusion: Surviving brothers and sisters of the intestate together with deceased brothers and sisters who left lineal descendants determine the share of the surviving brothers and sisters. The remainder, that part which is left after the brothers' and sisters' shares are subtracted, is then divided equally among surviving nieces and nephews who are decendants of the deceased brothers or sisters.

The inquiry indicates that A, a widow with no lineal descendants, died intestate, a resident of Northampton County. The statement of facts tends to indicate, although we make several assumptions, that A had nine brothers and sisters, four of whom survived her. Surviving one brother who predeceased A is a niece and surviving another brother who predeceased A are six nieces and nephews. We assume at this point that the other three brothers or sisters left no lineal descendants surviving them. We also assume that the five grand nieces and grand nephews who are survivors of the second brother are all children of the six nieces and nephews and that there are no deceased nieces or nephews in that family line. We assume that the other seven nieces and nephews who you indicate survived A are children of the first four surviving brother and sisters of A. With this statement of facts and if these assumptions are correct, then in determining the share taken by the surviving brother and sisters and nieces and nephews, we first consult G. S. 29-15(4) which provides:

> "(4) If the intestate is not survived by such children or lineal descendants or by a parent, the brothers and sisters of the intestate, and the lineal descendants of any deceased brothers or sisters, shall take as provided in G. S. 29-16 . . ." (*Emphasis added.*)

Thus, initially, we would foreclose the seven nieces and nephews whose parents, the brother and sisters of A, survive them from receiving any of A's estate.

Under the provisions of G. S. 29-16(b)(1) and (2), we would first divide A's estate into six since there were four surviving brothers and sisters and two deceased brothers who left decendants. The surviving brother and sisters would each receive one-sixth of A's estate. This leaves one-third of A's estate to be divided among nieces and nephews who are children of deceased brothers. There are, according to the information you furnished us, seven surviving nieces and nephews so that each of those nieces and nephews would receive one-seventh of one third of the estate or 1/21st of the estate each.

Robert Morgan, Attorney General
(Mrs.) Christine Y. Denson
Assistant Attorney General

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4 December 1970

Subject: Social Services; Liens; Statutes of Limitations or Conditions Precedent; Tolling of Statutes of Limitations

Requested by: Mr. Henry T. Drake,
Anson County Attorneys

Question: Is there a cause of action for the enforcement of a welfare lien when the lien was in effect for 10 years prior to January 1, 1970, and no "additional statement of such lien" was filed on

or prior to January 1, 1970, in accordance with the provisions of G. S. 108-33?

Conclusion: There is no cause of action for the enforcement of a welfare lien when the lien was in effect for 10 years prior to January 1, 1970, and no "additional statement of such lien" was filed on or prior to January 1, 1970, in accordance with the provisions of G. S. 108-33.

G. S. 108-33 provides, in pertinent part, that

> "the lien created by G. S. 108-29 shall continue from the date of filing until satisfied, provided that any such lien which has been filed more than 10 years prior to January 1, 1970, and any such lien which shall become 10 years old thereafter shall expire unless an additional statement of such lien is filed and properly indexed as required by G. S. 108-30, prior to the date of such expiration."

It appears that it is the sense of G. S. 108-33 that January 1, 1970, is the expiration date for any lien which has been filed more than 10 years prior to January 1, 1970, and no "additional statement of such lien" has been filed prior to January 1, 1970. Since G. S. 108-33 says that the lien *shall expire* unless the required additional statement is filed, it does not appear that any lien remains to support a cause of action if the required additional statement has not been filed.

It should be noted, however, that this opinion pertains to the expiration of the *lien* as distinguished from the *claim* described in G. S. 108-29 and G. S. 108-32.

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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8 December 1970

Subject: Municipalities; Contracts; Bidding

Requested by: Mr. John B. Lewis
Farmville Town Attorney

Question: Can the Town of Farmville award a contract for the construction of a water system to a bidder submitting a sealed bid and received prior to the bid opening but modified by a telegram received subsequent to the opening, when the contract documents provide that any informality in the bidding may be waived?

Conclusion: A bid may not be modified by a telegram after the bid opening as it could nullify the provisions relating to sealed bids and such modification of a bid would not be within the spirit of the competitive bidding requirements of G. S. 143-129.

The facts as indicated in a letter of December 3, 1970, indicates that sealed bids were received by the Town of Farmville for the construction of a water and sewerage system. The bid opening was December 1 at 2:00 P.M. A telegram was sent at 12:26 P.M. by one of the bidders who had previously submitted a sealed bid. This telegram was not received until 2:55 P.M. The telegram modified the bid previously submitted by the bidder. The Town Attorney requests advice as to whether or not the municipality can accept the bid as modified by the telegram, if it is in the best interest of the town to do so.

The conditions of the bid are set out in the information for bidders and the advertisement for bids. The relevant conditions are that bids be withdrawn prior to the scheduled time for opening of bids; that any bid received after the time and date specified will not be considered; that no bidder may withdraw a bid within 30 days after the actual time of the opening thereof; and that bids may be modified by telegram prior to closing time for receiving bids, provided the telegram is received prior to closing. The information

furnished the bidders and the advertisement for bids provide that the owner reserves the right to waive any informality in the bidding.

G. S. 143-129 provides that the advertisement shall state the time and place for the opening of proposals. This statute also provides that the proposal shall be opened in public and recorded on the minutes. The purpose of G. S. 143-129 is to prevent favoritism, corruption, fraud and imposition in the awarding of public contracts. Mullen v. Louisburg, 225 N.C. 53. The "advertisement for bids" requested sealed bids. G. S. 143-129 prohibits the opening of sealed bids or exhibition of contents prior to the time set for opening. The purpose of this requirement is to prevent publicity as to the contents of the respective bids, opportunities for collusion between bidders, and negotiation between public officers and bidders. 43 Am. Jur., Public Works and Contracts, paragraph 39, page 780. The modification of a bid after the bid opening could nullify the provisions relating to the opening of sealed bids. Also, the consideration of a bid or modification of a bid received subsequent to the time of the public bid opening would not be within the spirit of the competitive bidding requirements of G. S. 143-129. Therefore, I am of the opinion that the waiver of informality refers only to bids or modifications of bids received prior to bid opening and modifications by telegram received after the bid opening cannot be considered.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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9 December 1970

Subject: Education; Teachers; Extracurricular Activities After Normal School Hours

Requested by: Mr. Heyward C. Bellamy,
Superintendent
New Hanover County Schools

Question: May teachers in the public schools of North Carolina be required to supervise extracurricular activities, such as athletic contests, school plays, field trips, et cetera, after normal school hours?

Conclusion: Public school teachers may be required to supervise extracurricular activities conducted under the auspices of the school as long as the activities are distributed impartially and are reasonable in number and hours of duty required.

The issue of whether teachers, as a part of their contractural obligations, may be required to conduct and supervise extracurricular activities has been the subject of court decisions in at least three instances. In each it was held that a teacher's contractural responsibility extends to supervising extracurricular activities.

Parrish v. Moss, 106 N.Y.S. 2d 577, affirmed, 107 N.Y.S. 2d 580 (1951), held that the extracurricular assignments were permissible but should be related to the teacher's field of specialty.

In *McGrath v. Burkhard*, 280 P. 2d 864 (Cal. 1955), the court held that no particular teacher should be discriminated against in the assignment of extracurricular activities, i.e., that extracurricular assignment of each teacher be comparable to that of other teachers.

McGrath involved a teacher in the Sacramento Senior High School who sued to prohibit the board of education from assigning him extracurricular responsibilities in athletics or at social functions. His refusal to accept extracurricular assignments resulted in his being assigned an extra class. He contended that such assignments were police work, unprofessional in nature, foreign to his field of instruction, and unreasonable in the number of hours they added to his duties which were not contemplated in his contract. The court held that a board of education has authority to assign teachers to extracurricular activities so long as such assignments are impartial and without discrimination in relation to other teachers in the school system. These activities, it was reasoned by the court, are part of the total school program; they are in the interest of students,

parents, and community; they need to be carried on; they can best be conducted under the auspices of a school; teachers are expected to assist with them; and there is nothing unreasonable in a fair assignment of extracurricular responsibilities.

A similar decision was rendered in *Pease v. Mill Creek Township School District*, 195 A. 2d 104 (Pa. 1963), in which teachers were required to supervise students at athletic and social activities conducted under the name and auspices of the school. These assignments were held to be within the scope of the contract of the teacher and to be proper as long as they were distributed impartially and were reasonable in number and hours of duty required.

Although no appellate court in North Carolina has spoken to the issue, we are of the opinion that the great weight of authority supports the assignment of extracurricular activities to public school teachers so long as the assignments are distributed impartially and are reasonable in number and hours of duty required.

Robert Morgan, Attorney General
Andrew A. Vanore, Jr.,
Assistant Attorney General

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18 December 1970

Subject: State Departments, Institutions & Agencies; Funds; Deposit of Funds in Banks in Name of State Treasurer; Necessity of Security; G. S. 147-77 Through G. S. 147-81.

Requested by: Honorable Edwin Gill
State Treasurer

Question: Which State funds are required by law to be secured by bond or by additional collateral security when deposited in a

bank pursuant to G. S. 147-77 through 147-81?

Conclusion: Except as to special provisions with respect to sums not in excess of that secured by the Federal Deposit Insurance Corporation, all State funds which are required by law to be deposited in the name of the State Treasurer in banks designated by him as official depositories must be secured by furnishing a bond or, in lieu thereof, approved collateral securities to secure such deposits, pursuant to the provisions of G. S. 147-77 through 147-81.

Although G. S. 147-77 through 147-81 deal with the necessity of securing certain State funds, deposited with banks in the name of the State Treasurer, except to the extent such deposits are insured by the Federal Deposit Insurance Corporation, the funds which are subject to such requirements under the general law are those described in G. S. 147-77 which reads as follows:

> "§ 147-77. *Daily deposit of funds to credit of Treasurer.*—All funds belonging to the State of North Carolina, in the hands of any head of any department of the State which collects revenue for the State in any form whatsoever, and every institution, agency, officer, employee, or representative of the State or any agency, department, division or commission thereof, except officers and the clerks of the Supreme Court and Court of Appeals, collecting or receiving any funds or money belonging to the State of North Carolina, shall daily deposit the same in some bank, or trust company, selected or designated by the State Treasurer, in the name of the State Treasurer, at noon, or as near thereto as may be, and shall report the same daily to said Treasurer: Provided, that the Treasurer may refund the amount of any bad checks which have

been returned to the department by the Treasurer when the same have not been collected after thirty days' trial."

From the above, it is quite clear that the funds referred to are limited to those deposited "in the name of the State Treasurer."

No State funds other than those described above would be subject to any mandatory requirement that a depository furnish security therefor under the general laws referred to above.

It may be that there are specific statutes dealing with specific agencies or funds in addition to those embraced in the general law. The mandatory requirement would exist only if the specific statute so required.

There are other statutes, not pertinent to the question presented here, requiring that depository banks furnish security for certain local governmental funds.

Robert Morgan, Attorney General
Harry W. McGalliard,
Chief Deputy Attorney General

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18 December 1970

Subject: Public Officers & Employees; Double Office Holding; Solicitor, Temporary; Appointment Under G. S. 7A-64 Is Public Office.

Requested by: Mr. John C. W. Gardner
Mount Airy Town Attorney

Question: Is an attorney who holds a temporary appointment under G. S. 7A-64(2) a public officer who may not hold this position at the same time he holds the

position of town commissioner?

Conclusion: Yes. After January 1, 1971, a person appointed under G. S. 7A-64(2) holds a temporary appointment as solicitor and therefore is considered a public officer and may not hold another public office at the same time. There is a distinct difference between the language in old G. S. 7A-165, which will be repealed, effective January 1, 1971, which authorized an administrative officer of the court to approve the designation of a qualified attorney by the district prosecutor to assist in the prosecution of criminal dockets. Under this statute, the attorney was merely designated to assist in the prosecution and was not a solicitor per se, and was paid on a per diem basis. However, as of January 1, 1971, G. S. 7A-64(2) will be effective and as previously stated, the person appointed holds a temporary appointment as solicitor and therefore would be classified as a public officer.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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18 December 1970

Subject: Criminal Law & Procedure; Narcotic Drugs; Definition of Infants Under G. S. 90-111(c)

Requested by: Mr. Charles Dunn, Director
State Bureau of Investigation

Question: Is it a violation of G. S. 90-111(c) for a person 21 years of age or older to sell, barter, peddle, exchange, dispense or supply marijuana or narcotic drugs to a person under 21 years of age?

Conclusion: Yes. Under the common law, which is in effect in North Carolina, unless abrogated by statute, persons whether male or female are classified and referred to as infants until they attain the age of 21 years. The words "minor" or "minority" describe a person under a certain age as the state or condition of a minor, an infant. Therefore the word "minor", as used in G. S. 90-111(c) has the same meaning as the word "infant". The word "adult" used in this statute means a person, male or female, who is 21 years of age or older.

The common law, to the extent it has not been abrogated by or repealed by statute, is in force in this State. (2 Strong, N. C. Index, page 157). Unless defined by statute, a person is an infant in North Carolina until he or she attains the age of 21 years (*Personnel Corporation v. Rogers*, 276 N. C. 279; 42 Am. Jur. 2d, Infants, Sec. 3; 43 C.J.S., Infants, Sec. 2).

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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29 December 1970

Subject: Public Officers & Employees; Double Office Holding; Register of Deeds; Clerk to the Board of County Commissioners.

Requested by: Mr. John T. Page, Jr.
Richmond County Attorney

Question: If the register of deeds is appointed clerk to the board of county commissioners under G. S. 153-40, would he be ex officio clerk to the board and would this constitute double office holding and should he sign documents as clerk or ex officio clerk to the board?

Conclusion: Under both G. S. 161-23 and 153-40, the county board of commissioners may appoint the register of deeds or any other county officer or employee as clerk to the board. These two statutes should be construed together and G. S. 161-23 states that the register of deeds shall be ex officio clerk of the board of county commissioners. G. S. 153-40 seems to recognize the ex officio status of the register of deeds for it states that the board may confer the duties of clerk on the register of deeds or any other county officer or employee. Considering the position of clerk to the board of county commissioners as a public office, the fact that the register of deeds is appointed clerk to the board of county commissioners does not violate the double office holding prohibition of Article XIV, Section 7 of the North Carolina Constitution, since duties of one office may be conferred upon an existing office. The statutes are silent as to how the register of deeds should sign documents when he is acting as ex officio clerk to the board of county commissioners but it would seem to be a more accurate designation for him to sign as ex officio clerk to the board of commissioners.

In *State v. Gouge*, 157 N.C. 602, it was stated that the register of deeds is ex officio clerk to the board of county commissioners and the two positions are not separate offices. In *Freeman v. Board of Commissioners*, 217 N.C. 209, it is stated that the constitutional provision against double office holding does not prevent the imposition of additional duties ex officio to offices already held. Thus, where the duties of clerk to the board of county commissioners is imposed upon the register of deeds or some other

county officer, a new oath would not be required since he is operating under his oath for the original office and is merely performing the duties of the clerk ex officio.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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NORTH CAROLINA ATTORNEY GENERAL REPORTS

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ROBERT MORGAN
ATTORNEY GENERAL

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ATTORNEY GENERAL

REPORTS

Opinions of the Attorney General
January 1, 1971 through June 30, 1971

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5 January 1971

Subject: Social Services; Legal Settlement; Living in a Nursing Home

Requested by: Mr. Joe Freeman Britt
Robeson County Attorney

Question: If an adult male enters a nursing home as a cancer patient in county B at a time when he has legal settlement, for the purpose of receiving public assistance, in county A, and his family moves to and takes up residence in county B, may his legal settlement for the purpose of receiving public assistance ever change to county B as long as he remains a patient in the nursing home?

Conclusion: If an adult male enters a nursing home as a cancer patient in county B at a time when he has legal settlement, for the purpose of receiving public assistance, in county A, and his family moves to and takes up residence in county B, his legal settlement for the purpose of receiving public assistance may not change to county B as long as he remains a patient in the nursing home.

G. S. 153-159 is, in pertinent part, as follows:

> "§153-159. *Legal settlements; how acquired*.--Legal settlements may be acquired in any county, so as to entitle the party to be supported by such county, in the manner following, and not otherwise:
>
> (1) By One Year's Residence.–Every person who has resided continuously in any county for one year shall be deemed legally settled in that county: Provided, that every person who has legal settlement in any county of this State shall, after having resided continuously in any other

county for three months, be deemed legally settled in such other county, for purposes of the county poor law codified as article 13 of chapter 153 of the General Statutes.

. . .

(5) Settlement to Continue until New One Acquired.--Every legal settlement shall continue till it is lost or defeated by acquiring a new one, within or without the State; and upon acquiring such new settlement, all former settlements shall be defeated and lost."

An excerpt from 70 C.J.S., Paupers, Sec. 32 is as follows:

> "The term 'residence' within the meaning of statutes relating to the acquisition of settlements by residence . . . means the same thing as 'home', 'abode', or 'place of dwelling', 'residing' in similar statutes means 'having a home' or 'abode' etc."

Living in a nursing home in a given county does not constitute "having a home" in that county in the usual sense of the words "having a home." This is not to say, of course, that once a person has established a "home" in the usual sense in a county that his period of residence would be interrupted by entering a nursing home.

In the case of *Commissioners of Burke v. Commissioners of Buncombe*, 101 N.C. 520, the North Carolina Supreme Court held that Buncombe County was responsible for the care of a person who escaped into Burke County from an alms house in Buncombe County and was cared for by Burke County for several years in the county home. In that case, the patient had been arrested and "charged with insanity" in Burke County and then sent to the county home in Burke County. In rendering its decision the Court noted that the mental state of the patient was not such that he could form an intent as to residence. The Court said that "it is

manifest that a confinement for one year under legal process does not constitute such a residence as is contemplated by the statute."

Although in the case under consideration no question of mental capacity or commitment by legal process is involved, nevertheless it is not perceived that entering and remaining in a nursing home as a patient for three months or any other period of time constitutes such a residence as is contemplated by the provisions of G. S. 153-159.

It is noted that the first paragraph of Section 416, North Carolina Department of Social Services Welfare Programs Manual, Volume II, is in accord with this opinion. It is as follows:

> "When a *recipient* of OAA or APTD moves from his county *directly* to a licensed group care facility in another county, the county from which he is receiving assistance continues the payment as long as the recipient lives in the licensed group care facility and continues to meet eligibility requirements."

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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11 January 1971

Subject: Public Records; North Carolina State University at Raleigh; Textbook Lists; Right of Inspection

Requested by: Mr. J. D. Wright, Administrator
Finance and Business
North Carolina State University at Raleigh

Question: Are documents of North Carolina State University at Raleigh setting forth

textbook lists, or a master list compiled therefrom, public records open to inspection by the public, within the meaning of Chapter 132 of the General Statutes?

Conclusion: Documents of North Carolina State University at Raleigh setting forth textbook lists, or a master list compiled therefrom, are public records open to inspection by the public, within the meaning of Chapter 132 of the General Statutes.

It appears from letters and telephone information furnished by Mr. J. D. Wright, Administrator, Finance and Business, and Mr. Ernest E. Durham, Business Services Officer, of North Carolina State University at Raleigh, that textbook lists are compiled for the use of the Student Supply Store (University owned and operated). The mechanics of compiling the list or lists involve the submission to the Store of some 2,200 request forms from various departments of the University, furnishing the desired textbook information with respect to the textbook or books to be used in each course. These lists are not furnished to off-campus, private retail vendors and access to the lists are denied them. An attorney for a private client has asserted that such textbook lists are public records within the meaning of Chapter 132 of the General Statutes, Section 132-6 of which requires that public records shall be open to inspection at reasonable hours and that the custodian shall furnish certified copies thereof on payment of fees as prescribed by law. The question presented requires an interpretation of G. S. 132-1, which defines public records as follows:

> "Public records comprise all written or printed books, papers, letters, documents and maps made and received in pursuance of law by the public offices of the State and its counties, municipalities and other subdivisions of government in the transaction of public business."

Several arguments have been advanced in defense of secrecy. It has been asserted that only through monopoly can an educational

institution assure students of the certain availability of an adequate supply of textbooks at any given time. It is asserted that only a "minimal profit" is charged. It is asserted that profits are used for much needed scholarships.

These are interesting arguments but are not really pertinent to the legal question presented. Furthermore, if only "minimal profits" are charged, it is difficult to see how very much of a scholarship fund could be developed. Also, if only a "minimal profit" is charged, it would appear there would be no need to fear off-campus competition from private vendors who would have to compete against "minimal profit" prices, and at the same time, absorb non-University expenses such as taxes, rent and other overhead.

Regardless of the merits of the arguments for the monopoly, the legal question is the very narrow one of whether or not such textbook lists are public records within the purview of the statute quoted above and, more particularly, whether they are "papers . . . documents . . . made and received in pursuance of law . . . ." In construing this statute on many occasions, it has always been the view of this office that the statutory phrase "in pursuance of law" is not to be narrowly construed so as to limit the chapter to only documents specifically prescribed by law to be made or received. In the opinion of this office, the phrase is more properly interpreted to mean or describe an act done in one's public employment capacity as opposed to a private act. The University is operated pursuant to law and, obviously such textbook lists are compiled as part of the "transaction of public business" in the operation of the University. Therefore, it is concluded that the University textbook list or lists should be made available for inspection by private individuals at reasonable hours and that certified copies should be furnished upon payment of reasonable cost for preparation.

Robert Morgan, Attorney General
Harry W. McGalliard,
Chief Deputy Attorney General

- - -

19 January 1971

Subject: Taxation; Intangibles Tax; Accounts Payable; Evidences of Debt; Checks; Drafts; G. S. 105-201, 202.

Requested by: Honorable I. L. Clayton
Commissioner of Revenue
Mr. A. R. Waters, Jr., Director
Intangibles Tax Division

Question: Are drafts payable deductible from accounts receivable, or from evidences of debt receivable, in determining a taxpayer's intangibles tax liability?

Conclusion: Drafts are evidences of debt, and those which are payable are deductible from evidences of debt which are receivable, in determining intangibles tax liability, but only in the proportion permitted by G. S. 105-202.

Inquiry has been made as to whether drafts payable are deductible, for intangibles tax purposes, from accounts receivable, under G. S. 105-201, or from evidences of debt, under G. S. 105-202.

For intangibles tax purposes under G. S. 105-201, accounts payable are deductible from accounts receivable "in the proportion which the total face value of accounts receivable taxable under this section bears to the total face value of all accounts receivable of the taxpayer."

Under G. S. 105-202, "all bonds, notes, demands, claims, deposits or investments in out-of-state building and loan and savings and loan associations and other evidences of debt" having a situs in this State are subject to the intangibles tax. In addition, "like evidences of debt owed by the taxpayer may be deducted only in the proportion which the total actual value of evidences of debt taxable under this section bears to the total actual value of all like evidences of debt owed by the taxpayer."

We believe that the law of this and other jurisdictions supports the conclusion that drafts are "evidences of debt" and therefore taxable, or deductible as the case may be, under G. S. 105-202, and not under G. S. 105-201.

For example, it has been held in Wyoming that a check "is an evidence of indebtedness, and, as between the drawer and the payee, is equivalent to the drawer's promise to pay, although the latter may not be bound absolutely until payment has been duly demanded of the bank and refused."

> *Brown v. Cow Creek Sheep Co.* (1912), 21 Wyo. 1, 126 P. 886, 890.

Similarly, in Ohio, a check "is an evidence of indebtedness and, as between the drawer and the payee, is equivalent to the drawer's promise to pay."

> *State v. Hearn* (1926), 115 Ohio St. 340, 154 N.E. 244, 245.

"Under the law, a check is an instrument by which a depositor seeks to withdraw funds from a bank. As between the drawer and the payee, it is an evidence of indebtedness."

> *Camas Prairie State Bank v. Newman* (1908), 15 Idaho 719, 99 P. 833, 834, 835.

A check is a form of draft, and we perceive no reason why, if a check is an evidence of debt, a draft other than a check should not be similarly treated. G. S. 25-3-104(2); see also 11 Am Jur 2d, Bills and Notes, §§13, 14 and 16.

Further, the statute (G. S. 105-202) clearly taxes "notes". The Supreme Court of North Carolina has observed that "as a practical matter, in business transactions, there is little difference between a check and a demand note. Both are acknowledgments of indebtedness and an unconditional promise to pay."

> *Diemar and Kirk Company v. Smart Styles, Inc.* (1964), 261 N.C. 156, 134 S.E. 2d 134, 136. To the

same effect, see *Mason v. Blayton* (1969), 119 Ga. App. 203, 166 S.E. 2d 601; *Smith v. Treuthart* (1927), 130 Misc. 394, 223 N. Y. S. 481, 482.

Therefore, if a note is taxable under G. S. 105-202 as an evidence of debt, a check, or a draft, which is also an acknowledgment of indebtedness, should be treated in the same fashion.

G. S. 105-202 also taxes "demands" and "claims". We observe that a check has at least in one case been characterized as a "debt, demand or claim" where a statute forbade extradition if the proceeding were used to aid in the collection of a "debt, demand or claim" and the offense charged was the utterance of a bad check, collection of which was sought by the complainant.

Scott v. State (1948), 33 Ala. App. 328, 30 So. 2d 390.

Upon the foregoing, we conclude that drafts and checks are "claims", "demands" or "other evidences of debt" which if receivable are taxable under G. S. 105-202 if their situs is in this State, and if payable, are deductible from evidences of debt receivable in the proportion provided in G. S. 105-202 and referred to above. We also refer to a previous opinion of this office, dated 26 April 1962, to the same general effect.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General

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27 January 1971

Subject: Taxation; Real Estate Excise Stamp Tax; Conveyances by Operation of Law; Commissioners' Deeds; G. S. 105-228.29.

Requested by: Patsy Thomas

Caldwell County Register of Deeds

Question: Is a commissioner's deed made pursuant to G. S. 1-339.1 et seq. a conveyance by operation of law and therefore excluded from the operation of the excise stamp tax on conveyances?

Conclusion: A commissioner's deed made pursuant to G. S. 1-339.1 et seq. is not a conveyance by operation by law and is subject to the excise stamp tax on conveyances.

The answer to the question here is limited to sales made pursuant to a judicial sale by a duly appointed commissioner. G. S. 105-228.29 provides:

> "The provisions of this article shall not apply to transfers of an interest in real estate by operation of law, by lease for a term of years, by or pursuant to the provisions of a will, by intestacy, by gift, by merger or consolidation, or by instruments securing indebtedness, or any other transfer where no consideration in property or money is due or paid by the transferee to transferor." (Emphasis added).

The above section expressly excludes "transfers of an interest in real estate by operation of law." The present question is whether a conveyance made by a commissioner pursuant to a judicial sale is a transfer "by operation of law." That term defined by Black's Law Dictionary, Fourth Edition, is as follows:

> "OPERATION OF LAW. This term expresses the manner in which rights, and sometimes liabilities, devolve upon a person by the mere application to the particular transaction of the established rules of law, without the act or cooperation of the party himself." p. 1243.

It is clear from this definition that the commissioner's deed is not a transfer "by operation of law." The transfer requires more than

the mere application of the rules of law. G. S. 1-339.28 provides:

> "No public sale of real property may be consummated until confirmed. . ."

Also, G. S. 1-339.29 provides:

> "Upon confirmation of a public sale of real property, the person authorized to hold the sale, or such other person as designated by the judge or clerk of superior court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser."

More is required than the application of a rule of law.

Some transfers "by operation of law" listed in the statute are transfers by intestate succession, or by will. Another example, not listed in the statute, is the vesting of title in a remainderman when the life tenant dies. The vesting is by operation of law and no conveyance is necessary to complete it. The commissioner's deed under discussion here is quite different. No title would vest unless there was a sale, confirmation, and finally a deed of conveyance. The title does not vest in the buyer automatically, but must be conveyed to him. Therefore, the transfer is not "by operation of law" and is subject to the excise stamp tax on conveyances. Consistent with the above, it is observed that under the former federal law, it was held that a sheriff's deed pursuant to a foreclose action was subject to the now repealed federal documentary stamp tax on conveyances. *Boise Title and Trust Company v. Evans*, 295 Fed. 223, 4 A.F.T.R. 3761 (D.C. Idaho; 1924), and *Home Title Insurance Company v. Keith*, 230 Fed. 905, 4 A.F.T.R. 4216(1916).

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

27 January 1971

Subject: Criminal Law & Procedure; Concealed Weapons; What Constitutes; G. S. 14-269.

Requested by: Honorable Albert Jackson
Sheriff of Henderson County

Question: Is the possession of a pistol in a private vehicle, whether loaded or unloaded, a concealed weapon under G. S. 14-269?

Conclusion: The mere possession of a pistol in a private automobile, which is not concealed, and whether loaded or unloaded, is not a violation of G. S. 14-269.

It is the wilful and intentional carrying of a concealed pistol, gun or other deadly weapon of like kind about a person which constitutes a violation of G. S. 14-269.

The particular circumstances of each case determine whether the deadly weapon is a concealed weapon, and the weapon must be possessed off of the person's premises. The possession of a concealed weapon in an automobile which is on the public highways is off of a person's premises and thus comes within the meaning of G. S. 14-269.

In *State v. Gainey*, 273 N.C. 620, our Supreme Court cited *State v. McManus*, 89 N.C. 555, and stated: "The language is not 'concealed on his person' but 'concealed about his person,' that is, concealed near, in close proximity to him, and within his convenient control and easy reach so that he could promptly use it if prompted to do so by any violent motive. It makes no difference how it is concealed, so it is on or near to and within the reach and control of the person charged."

The statute does not require the pistol or gun to be loaded; therefore, it is our view that it is immaterial that the gun or pistol is unloaded so long as it is concealed and the concealment constitutes a violation of G. S. 14-269.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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27 January 1971

Subject: Taxation; Intangibles Tax; Accounts Receivable; Accounts Payable; Bonuses; G. S. 105-201

Requested by: I. L. Clayton,
Commissioner of Revenue
A. R. Waters, Jr., Director
Intangibles Tax Division

Question: May a corporation whose taxable year is the calendar year deduct from its accounts receivable on 31 December bonuses which were not approved for payment until after that date?

Conclusion: A corporation whose taxable year is the calendar year may not deduct from its accounts receivable on 31 December bonuses which were not approved for payment until after that date.

Inquiry has been made as to the intangibles tax treatment of the following hypothetical situation:

Through 31 December 1967, the employees of an accrual basis corporate taxpayer whose taxable year was the calendar year, were entitled only to their ordinary salaries and wages and during 1967, the corporation took no action which entitled the employees to receive, or to require payment of, any bonus. However, on 10 January 1968, the corporation by appropriate action of its Board of Directors, determined that a bonus would be paid to certain employees "as of" 31 December 1967. On 20 January 1968, the bonuses were in fact paid. The bonuses represented amounts payable to those employees as a result of income earned by the corporation during 1967. The corporation showed "accrued bonuses" on its

balance sheet for the year ending 31 December 1967, and properly deducted the bonuses as an expense in determining its 1967 income tax liability.

G. S. 105-201 taxes accounts receivable, having a situs in this State, on 31 December of each year (if the taxpayer reports for income tax purposes on a calendar year basis) and permits the deduction of accounts payable of the taxpayer in the proportion which the total face value of accounts receivable taxable under G. S. 105-201 bears to the total face value of all accounts receivable of the taxpayer. The question here is whether or not the bonuses whose payment was authorized in January 1968 were, on 31 December 1967, an account payable, such that they might be deducted from the corporation's accounts receivable.

As to the employees, it would appear that they were not possessed of accounts receivable on 31 December 1967 which would be subject to tax under G. S. 105-201. With respect to the bonus, neither is the corporation possessed of an account payable on 31 December 1967 which it could deduct from its accounts receivable under G. S. 105-201. The liability to pay, on one hand, and the right to receive payment, on the other, simply did not come into existence until the corporate action of 10 January 1968.

The same result would follow if the corporation reported its accounts receivable on a fiscal year basis ending 30 June 1967 but did not take official action to approve payment on bonuses until 10 July 1967. In such case, the corporation would not be entitled to deduct the bonuses payable from its accounts receivable owned as of 30 June 1967. The employees, reporting on a calendar year basis, would not be required to report the bonuses as accounts receivable unless they remained unpaid as of 31 December 1967.

In summary, a corporation or other taxpayer would not be entitled to deduct bonuses payable from its accounts receivable unless such bonuses were declared or otherwise approved and determinable by the close of its taxable year. In a like manner, an individual reporting on a calendar year basis would not be required to report a bonus receivable unless such bonus had been declared or was otherwise approved and determinable by 31 December.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General

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27 January 1971

Subject: Counties; Fire Departments; Expenditure of Tax Funds.

Requested by: Mr. William A. Hoover, Jr.
Cherokee County Attorney

Question: May a county appropriate from the general fund tax monies to support a rural fire department which furnishes fire protection in only one of the six townships of the county under the authority of G. S. 153-9(39)?

Conclusion: No.

G. S. 69-25.1 and following sections provide for the creation of a rural fire protection district and the levy of a tax therein to be used for furnishing fire protection within the district. G. S. 153-9(39) authorizes a county to provide for an organized county fire company and county fire department and to levy annual taxes for the payment of the same as a special purpose. This statute contemplates a county-wide fire deparment. Thus it does not appear that the county would have authority to take general tax funds and allocate them to a rural fire department which furnishes fire protection in only one township of the county.

The conclusion above seems to be supported by *Commissioners v. Lacy*, 174 N. C. 141, wherein the Court said:

> "It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes for the benefit of the public on whom they are imposed,

and to lay these burdens upon one district for benefits appertaining solely to another is in clear violation of established principles of right and contrary to the express provisions of our Constitution, Article I, Section 17, which forbids that any person shall be deprived of his freehold liberties and privileges or in any manner deprived of his life, liberty or property but for the law of the land."

See *Hinton v. Lacy*, 193 N. C. 496 and *Board v. Bond Co.*, 194 N. C. 137.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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27 January 1971

Subject: Motor Vehicles; Drivers' Licenses; Provisional Licensee; G. S. 20-13; Moving Violation

Requested by: Mr. Henry M. Whitesides,
Solicitor
Fourteenth Solicitorial District

Questions: (1) Does conviction of operating a motor vehicle upon the highway with improper tail lights constitute a moving violation which entails points under the provisions of G. S. 20-16?

(2) Would conviction of a provisional licensee of operating a motor vehicle upon the highway with improper tail lights be chargeable as a moving violation under the provisions of G. S. 20-13?

Conclusions: (1) Yes, conviction on a charge of operating a motor vehicle upon the highway with improper tail lights would carry two points under the schedule of point values as set forth in G. S. 20-16(c).

(2) Yes, such conviction would constitute a moving violation chargeable under the provisions of G. S. 20-13.

With regard to Conclusion (1), G. S. 20-129(d) requires rear lamps on motor vehicles, trailers or semi-trailers. Violation of this subsection is not excluded from the point schedule set forth in G. S. 20-16(c) and therefore would be a two point violation.

With regard to Conclusion (2), G. S. 20-129(d) requires rear lamps on motor vehicles, trailers and semi-trailers. Violation of this subsection is not excluded as a moving violation by subsection (a) of G. S. 20-13 and therefore would be a chargeable moving violation.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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29 January 1971

Subject: Public Officers & Employees; Medical Examiners and Coroners; No Authority for Coroner to Order an Autopsy.

Requested by: Mr. Edgar E. Smith
Bladen County Coroner

Question: Does a coroner have the right to order an autopsy upon a deceased person whenever it appears that the deceased probably came to his death by the criminal act or default

of some person?

Conclusion: No. There is no statutory authority for a coroner to order an autopsy in any case coming within his jurisdiction and the duty and authority of performing an autopsy has been imposed upon the medical examiner when the death of any person was caused apparently by criminal act or default, suicide, or while the person was an inmate of any penal or correctional institution or under any suspicious, unusual or unnatural circumstances.

G. S. 152-7 provides that it is the duty of the coroner, whenever it appears that the deceased probably came to his death by the criminal act or default of some person, to make a careful investigation and inquiry as to when and by what means such deceased person came to his death. A written report of said investigation shall be filed with the medical examiner and the solicitor of the superior court. There is no direct authority in Chapter 152 of the General Statutes authorizing the coroner to perform an autopsy or order an autopsy to be performed upon a deceased person.

G. S. 130-198 provides that upon the death of any person apparently by criminal act or default, or apparently by suicide, or while an inmate of any penal or correctional institution, or under any suspicious, unusual or unnatural circumstances, the medical examiner of the county shall be notified of such death, and no person shall disturb the body at the scene of the death until authorized by the county medical examiner.

G. S. 130-199 imposes the duty upon the medical examiner to take charge of the dead body, to make inquiries regarding the cause and manner of death, and under G. S. 130-200, if in the opinion of the chief medical examiner or the medical examiner of the county, under any of the circumstances set forth in G. S. 130-198, it is advisable and in the public interest that an autopsy or other pathologic study be made, such autopsy or pathological study shall be made by the chief medical examiner or by a competent

pathologist designated by him.

G. S. 90-217 was amended by Chapter 1154, Session Laws of 1967, to delete therefrom cases where a coroner or the majority of a coroner's jury deemed it necessary upon an inquest to have an autopsy. G. S. 90-217 was rewritten in 1969 so as to enumerate those persons who have a right to perform an autopsy. Authority is granted therein to the chief medical examiner or to the medical examiner of a county acting pursuant to G. S. 130-200 to direct that an autopsy be performed. There is no authority in G. S. 90-217 for a coroner to authorize or order an autopsy to be performed.

Construing the above statutes together, it is clear that the authority to order an autopsy has been withdrawn from the coroner and that in those cases enumerated for investigation by the coroner in G. S. 152-7, as well as those enumerated in G. S. 130-198, the authority to order an autopsy is placed in the chief medical examiner or the medical examiner of the county.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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29 January 1971

Subject: The Great Seal of North Carolina; G. S. 147-26; G. S. 144-2.

Requested by: Dr. H. G. Jones, Director
Department of Archives and History

Question: Is there any statutory description of the Great Seal of the State of North Carolina other than that contained in G. S. 147-26 and is it permissible, under law, to include within a newly designed seal representations other than those contained in G. S. 147-26?

Conclusion: G. S. 147-26 is the only General Statute describing the Great Seal of North Carolina, though G. S. 144-2 does state that the words "esse quam videri" shall be engraved on the Seal. There is no authority upon which to determine whether representations other than those described in the aforementioned statutes may be included in the official "Great Seal of the State of North Carolina" and it is felt that the determination of a definitive, all-inclusive description is a proper matter for the consideration of the General Assembly.

The question has been asked whether there is any statutory description of the Great Seal of the State of North Carolina other than that contained in G. S. 147-26 and whether it is permissible, under law, to include within a newly designed seal, representations other than those contained in the aforementioned statute.

The answer to the first question is simple. Except for G. S. 147-26, there is no description of the Great Seal in either the Constitution or the General Statutes. It would be good if the answer to the second question were just as obvious. However, it is not.

G. S. 147-26, entitled "To procure great seal of State; its description", reads as follows:

> "The Governor shall procure for the State a seal, which shall be called the great seal of the State of North Carolina, and shall be two and one-quarter inches in diameter, and its design shall be a representation of the figures of Liberty and Plenty, looking toward each other, but not more than half-fronting each other and otherwide disposed as follows:
>
> Liberty, the first figure, standing, her pole with cap on it in her left hand and a scroll with the word 'Constitution' inscribed thereon in her right hand. Plenty, the second figure, sitting down, her right arm half extended towards Liberty, three heads of wheat in her right hand, and in her left, the small end of

> her horn, the mouth of which is resting at her feet, and the contents of the horn rolling out; there shall also be inserted thereon the words 'esse quam videri'. It shall be the duty of the Governor to file in the office of the Secretary of State an impression of the great seal, certified to under his hand and attested by the Secretary of State, which impression so certified the Secretary of State shall carefully preserve among the records of his office."

A reference is made to the composition of the great seal in G. S. 144-2, titled "State Motto", which states, in part,

> "The words 'esse quam videri' are hereby adopted as the motto of this State, and as such shall be engraved on the Great Seal of North Carolina . . .".

The directive of this portion of G. S. 144-2 is consistent with the description embodied in G. S. 147-26. The description contained in G. S. 147-26 is clear and the casual observer might wonder, therefore, why any question should exist as to the design of the seal.

The question is raised because those close to State government are aware that over the years successive artists have supplied backgrounds and additional decorative elements for the representations described in G. S. 147-26. As a result of this "artistic license", a variety of "great seals" appear throughout State government and the lack of uniformity has become increasingly apparent. Let me illustrate.

Proclamations, commissions and other official documents issued by the Governor bear the Great Seal of North Carolina. The dye used to make the impression of the Seal found on these documents contains as a background a mountain range descending from left to right to the ocean upon which rests a three-masted ship. The Governor's note paper bears the same rendition of the seal and an identical seal is prominently displayed in the Governor's Conference Room in the Administration Building. This design, embracing the topography of the State, is used frequently and seems to be favored though a publication of the North Carolina Department of Archives

and History, titled "The History of the Great Seal", indicates this seal went out of vogue about 1893.

A second version contains only one element not described in G. S. 147-26; a mountain range descending from left to right. A "Great Seal" of majestic proportions in terrazzo mosaic, embedded in the approach to the State House, is so designed. This Seal, with mountains but without ocean or ship, is used on the letterhead of many State agencies, including the Department of Justice and the Governor's official stationery. "The History of the Great Seal" states this seal was first used in 1893 and has been widely used since.

A third version, seen more infrequently, contains as a background a mountain range with a stream flowing from left to right between the mountains and the figures of "Liberty" and "Plenty". Sometimes clouds are pictured above the mountains.

A fourth version, found upon the licenses issued by one State board and displayed in the offices of thousands of professional men throughout the State, probably contains the greatest variety of decorative additions and differs even as to the representations prescribed by statute. Liberty, described in G. S. 147-26 as ". . . standing, her pole with cap on it . . ." has two caps, one on her head and a second on her pole. Plenty, described as having ". . . three heads of wheat in her right hand . . ." appears to be holding olive branches instead. Plants, perhaps tobacco, are growing about them, and a forest is shown in the background.

All of the above described seals have the words "May 20, 1775" inscribed at the top. It should be noted, however, that no mention of the words "May 20, 1775" is made in G. S. 147-26. The question then arises as to how the date became a part of the seal. Perhaps the answer lies in the following discussion.

Chapter 145, Public Laws and Resolutions of the State of North Carolina, 1893, reads in part as follows:

> "Section 1. That the words 'esse quam videri' are hereby adopted as the motto of the State, and as such shall be engraved on the great seal of North Carolina *and likewise* at the foot of the coat-of-arms of the

State as a part thereof.

> "Section 2. That on the coat-of-arms, *in addition* to the motto, at the bottom, there shall be inscribed at the top the words 'May the 20th, 1775'."

This Chapter of the Session Laws was incorporated into the General Statutes of the State as G. S. 144-2 which reads as follows:

> "The words 'esse quam videri' are hereby adopted as the motto of this State, and as such shall be engraved on the great seal of North Carolina and likewise at the foot of the coat-of-arms of the State as a part thereof. On the coat-of-arms, in addition to the motto, at the bottom, there shall be inscribed at the top the words, 'May 20, 1775'."

It is reasonable to believe that this statute at some time was interpreted as a mandate to include the words "esse quam videri" and "May 20th, 1775" on both the State Seal and the coat-of-arms, thus accounting for the presence of the words "May 20, 1775" on the Great Seal. However, it may well be argued that a distinction was made in the Session Law between the use of the words "esse quam videri", included in Section 1 and directed to appear "on the great seal of North Carolina *and likewise* at the foot of the coat-of-arms", and the words "May 20th, 1775", the subject of Section 2 which the law says shall be on the coat-of-arms "*in addition to the motto*". There is no direct statement that the words "May 20th, 1775" shall appear on the seal.

Some contend that the representations on the seal were included because they constitute the coat-of-arms of this State and consequently, the words "May 20, 1775", a part of the coat-of-arms, are properly included. The validity of this argument is questionable because G. S. 147-26, which described the design, makes no reference to a coat-of-arms but instead described separately each representation and item to be included. Thus the date "May 20th, 1775" becomes conspicuous by its absence.

These observations are made to illustrate the degree of confusion which exists now and has existed in the past concerning the Seal.

However, one ray of light appeared to come from the statute itself, G. S. 147-26, which required that some governor of past years file "an impression of the Great Seal" with the Secretary of State for preservation among the records of his office. This ray is dimmed, though, by the discovery of only one such impression on file without the certification of a Governor or attestation by the Secretary of State as required by statute.

The impression found in the office of the Secretary of State is identical to that used by the Governor today on official documents, commissions, etc. It is kept in an envelope bearing the typed words "May 24, 1922", and the explanation "Metal Impression of the Present Great Seal". Interestingly enough, the envelope containing the metal impression has a version of the seal upon it which is different from the seal contained therein. The present Secretary of State does not regard this impression as an official filing as contemplated by the statute.

We find ourselves, therefore, back with the statute itself and a description which through custom, usage, and artistic license seems not to be regarded as all inclusive. The addition of background and artistic embellishments have been accepted by usage, but obviously not uniformly.

It certainly appears appropriate, in the light of existing confusion, for an all-inclusive description of the Great Seal to be adopted at this time by the State of North Carolina and used exclusively. This is a proper matter for the consideration of the General Assembly and because of lack of authority upon which to base a definitive decision, this office defers to the good judgment of that legislative body.

Robert Morgan, Attorney General
Carroll Leggett,
Special Assistant Attorney General

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1 February 1971

Subject: Mental Health; Involuntary Commitment,

G. S. 122-63; Right to Appeal From Clerk's Order; Due Process Requirements Concerning Involuntary Commitment.

Requested by: Mr. John C. Davis
Assistant Clerk of Superior Court
Forsyth County

Questions: (1) Does an alleged mentally ill or inebriate person have the right to appeal from an order of commitment entered by the clerk pursuant to G. S. 122-63?

(2) Can an appeal from such an order be perfected through the usual notice of appeal or would a writ of certiorari or some other extraordinary relief be required?

(3) Would the appellant be entitled to a hearing de novo or only to an appellate review as to questions of law?

(4) What rights under due process of law must be afforded the alleged mentally ill or inebriate person, specifically:

(a) How much notice is the alleged mentally ill or inebriate person entitled to receive of the hearing to be conducted before the clerk pursuant to G. S. 122-63?

(b) Does the alleged mentally ill or inebriate person have the right to confront and cross-examine witnesses, or may affidavits be received as evidence over objection by the alleged mentally ill or inebriate person?

(c) Is the alleged mentally ill or inebriate person entitled to counsel and must counsel be appointed in the event he is

indigent?

(d) Must the alleged mentally ill or inebriate person be advised of his rights, and, if so, what rights?

Conclusions: (1) G. S. 7A-251 provides for an appeal from an order of commitment entered by the clerk of court pursuant to G. S. 122-63.

(2) Also, relief from such an order may be sought by the extraordinary judicial remedy of a petition for writ of habeas corpus.

(3) Habeas corpus would afford the petitioner a de novo hearing before the appropriate judicial officer in regard to the question of whether petitioner, at the time the habeas corpus hearing is held, is a proper subject for involuntary hospitalization. Appeal under G. S. 7A-251 would bring the entire record from the clerk of court before a superior court judge for an appellate review as to questions of law.

(4) The constitutional safeguards requiring due process and equal protection of law must be studiously adhered to in a proceeding pursuant to G. S. 122-63 since the results of such a proceeding could be to forcefully deprive a person of his personal liberty.

(a) Reasonable notice sufficient to allow the respondent in such a proceeding to arrange for witnesses on his behalf to be present, and to otherwise properly prepare for the hearing is essential.

(b) So is an opportunity for the respondent to confront and cross-examine all witnesses whose testimony will be considered by the clerk in making his

determination.

(c) A respondent who is subject to involuntary commitment pursuant to G. S. 122-63 is entitled to be represented by counsel at the hearing by the clerk and at any later habeas corpus hearing. If indigent, he is entitled to have counsel appointed to represent him at the habeas corpus hearing.

(d) A respondent in a proceeding under G. S. 122-63 must be advised a reasonable time prior to the date of the hearing of his right to have witnesses testify in his behalf, by subpoena if necessary; to be represented by counsel; to confront and cross-examine all material witnesses testifying against him; and to appeal or to petition for writ of habeas corpus, with the assistance of court-appointed counsel if he is indigent, in the event an order adverse to his freedom is entered.

Article 7 of Chapter 122 does not contain any provision for an appeal from an order entered by the clerk in regard to judicial hospitalization. However G. S. 7A-251 provides as follows:

> "In all matters properly cognizable in the superior court division which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and the judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in Chapter 1 of the General Statutes."

Although judicial commitment proceedings are not strictly civil actions, *In Re Cook*, 218 N. C. 384, 11 S. E. 2d 142, such proceedings are matters of a civil nature. Therefore, such proceedings would be "matters properly cognizable in the superior court

division." (See G. S. 7A-240.) The appeal afforded pursuant to G. S. 7A-251 would not give respondent in a judicial commitment proceeding an opportunity for a trial de novo. G. S. 7A-251 clearly provides that the appeal from the clerk to the superior court lies "for review in all matters of law or legal inference." Therefore, the superior court would not sit as a trial court for a hearing de novo, but would be sitting strictly as an appellate court.

In the event that the respondent in the judicial commitment proceeding is taken into custody pursuant to an order entered by the clerk at the close of the hearing, then habeas corpus would be another proper remedy available to test the legality of his confinement. *In Re Harris*, 241 N. C. 179, 84 S. E. 2d 808 (1954). On petition for writ of habeas corpus there would be for the court to determine the question of whether or not at the time of the hearing on the writ the petitioner is in need of observation and treatment. Since the issue is in regard to petitioner's mental capacity at that time, as opposed to his capacity at the time the clerk entered the commitment order, a hearing on the merits with evidence and witnesses for each side would be required.

The ultimate effect of a judicial commitment order entered by a clerk of court pursuant to Article 7 of Chapter 122 is to deprive the respondent of his liberty. Both Article I, Section 17, of the Constitution of North Carolina and the 14th Amendment to the Constitutuion of the United States prohibit such a deprivation of liberty except by "due process of law," or "the law of the land," two phrases which have been held to be synonymous by our courts, *State v. Collins*, 169 N. C. 323, 84 S. E. 1049 (1915). This means that the procedure by which liberty is deprived must be consistent with the fundamental principles of liberty and justice. *State v. Chesson*, 228 N. C. 259, 45 S. E. 2d 563 (1947). Such procedures must minimally provide for notice and opportunity to be heard, *Eason v. Spence*, 232 N. C. 579, 61 S. E. 2d 717 (1950); *Randleman v. Henshaw*, 267 N. C. 136, 147 S. E. 2d 902 (1966). The amount of notice necessary to satisfy "due process" and "law of the land" requirements is that amount which would reasonably suffice to afford the responding party an opportunity to assert his defense, *Sudden v. Davenport*, 258 N. C. 27, 128 S. E. 2d 16 (1962); *State v. Covington*, 258 N. C. 495, 128 S. E. 2d 822 (1963).

As to the right of the respondent in a judicial commitment proceeding to confront and cross-examine witnesses if he so desires, it is the opinion of this office that such a respondent has this right as absolutely as does a defendant charged with a criminal violation. Due process should afford a person liable to being deprived of his liberty by reason of insanity no less protection than it affords a person liable to being deprived of his liberty upon conviction of a criminal violation. In either case the respondent should be "entitled to a full and fair cross-examination" of the witnesses who appear against him. *State v. Bunker*, 275 N. C. 670, 170 S. E. 2d 457 (1969).

It is the opinion of this office that due process also requries that a respondent in a judicial commitment proceeding be allowed to have an attorney to represent him. As to the question of whether it is required by due process that an indigent respondent be furnished an attorney in such a proceeding, there is no appellate decision from the state available. However, as a practical matter it would appear that the question is academic. As noted above, any person who is deprived of his liberty pursuant to a clerk ordering judicial commitment may bring habeas corpus immediately. G. S. 7A-451(2) provides that any indigent person is entitled to be furnished counsel in a hearing on a petition for a writ of habeas corpus.

This office is aware of no statute or case law which specifically requires that a respondent in a judicial commitment proceeding be advised of his procedural and substantive rights. However, in view of the fact that the right which respondent is subject to losing is that of personal liberty, one of the most jealously protected of all constitutional rights, it is the opinion of this office that due process would require that the respondent be advised of his right to a hearing prior to decision, his right to reasonable time to prepare for such hearing, his right to testify and adduce other evidence at such hearing, his right to confront and cross-examine adverse witnesses, and his right to petition for writ of habeas corpus, with the assistance of counsel if desired, in the event that a commitment order is enforced against him.

Robert Morgan, Attorney General
L. Philip Covington,
Staff Attorney

1 February 1971

Subject: Public Officers & Employees; Notaries Public; Register of Deeds; Probate of Notarized Instruments Not Containing Date of Expiration of Notary's Commission; G. S. 10-7 and 47-14(a).

Requested by: Mr. Alex T. Wood
Register of Deeds
Franklin County

Question: Does the register of deeds have authority to refuse to probate and record an instrument containing a notary's certificate which certificate does not have the date of the expiration of the notary's commission?

Conclusion: Yes.

G. S. 10-7 provides:

> "Notaries public shall state after each official signature by them the date of the expiration of their commissions; but the failure to do so shall not thereby invalidate their official acts."

G. S. 47-14(a) provides:

> "When the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the register of deeds of the county in which the instrument is offered for registration, the register of deeds shall examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears on the face of the instrument that the execution thereof by one or more of the signers has been duly proved or acknowledged and the certificate or certificates to that effect <u>are in due form</u>, he shall so certify, and shall register the instrument, together

with the certificates. No certification is required when the proof or acknowledgment is before the register of deeds of the county in which the instrument is offered for registration." (*Emphasis added.*)

Since G. S. 10-7, quoted above, specifically provides that the notary is to state after his signature the expiration date of his commission, a notary's certificate which does not have the date of expiration is not in due form and therefore a register of deeds can refuse to probate this instrument.

Robert Morgan, Attorney General
Millard R. Rich, Jr.,
Assistant Attorney General

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4 February 1971

Subject: Counties; Jails; Sites for County Buildings; County Finances; Transfer of Funds.

Requested by: Mr. Thomas E. Horne
Brunswick County Attorney

Questions:

(1) When a county is constructing two jails, one upon the site of the old jail and the additional jail on a new site, must there be compliance with the provisions of G. S. 153-9(9)?

(2) May the county erect a jail upon land deeded to the county when there is a reverter clause in favor of the grantor if the building is not used for a jail?

(3) May the board of commissioners transfer and use for jail construction funds which have been appropriated but unused for courthouse repairs?

Conclusions:

(1) The site of a county building may not be *changed* without compliance with G. S. 153-9(9). The site of a county building is the space occupied by the building and such adjacent land as is reasonably required for the convenient use of the building. *Brown v. Candler*, 236 N. C. 576. Thus if the new building is to be located on the same site, and the new building is for the same purpose as the old, then G. S. 153-9(9) as to notice is not applicable. We do not construe G. S. 153-9(9) to apply until a new site is to be used for the same purposes as the old building was used.

(2) Yes. The cases of *Hospital v. Durham County*, 231 N. C. 604, *Rex Hospital v. Commissioners of Wake*, 239 N. C. 312, indicate that a county may accept property upon a base, qualified or determinable fee. In addition, G. S. 160-61.2 authorizes counties and towns, upon such terms and conditions as is deemed wise, to exchange, lease to, lease from, sell to, purchase from, or enter into agreements regarding joint use of any interest in real property. In the instant case, it is assumed that the Town of Shallotte will be using the jail; thus, an agreement under G. S. 160-61.2 appears to be a preferable course of action.

(3) Assuming that the appropriation for courthouse repairs came from the general fund as opposed to a special tax levied for that specific purpose, then the transfer could be made under the authority of G. S. 153-127(3) which provides:

> "By transferring all or any portion of the unencumbered

balance of any appropriation in the general fund to any existing appropriation or to any new appropriation in another fund or by making a supplemental appropriation in another fund financed by unappropriated surplus or excess revenue receipts of the general fund: Provided, that no amendment to the budget resolution shall be made if the effect of such amendment is to authorize an expenditure for a purpose which could not have been legally authorized in the original budget resolution."

The facts controlling the foregoing questions and conclusions are as follows: Brunswick County has been required to build a new jail by the Department of Social Services. The old jail is located in Southport, the County seat. The County Commissioners have voted to build two jails, one in Southport on land owned by the County and behind the existing jail, and the other located in Shallotte upon land conveyed by the Town to the County. The deed will contain a reverter clause which will become effective if the County ceases to use the land for jail purposes. The Commissioners desire to transfer funds previously appropriated but unused for courthouse repairs to the jail construction fund.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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11 February 1971

Subject: Watershed Improvement Districts;

Exchange of Land of District for Privately Owned Land; G. S. 139-8(4).

Requested by: Mr. Samuel H. Johnson
Attorney for Wake County
Watershed Improvement Commission

Question: Is the Wake County Watershed Improvement Commission authorized, without public auction, to dispose of land by private exchange for other land?

Conclusion: Yes, if the lands are of substantially equal value.

The Wake County Watershed Improvement Commission is organized pursuant to Article 2, Chapter 139. The Commission desires to exchange 3.5 acres of real property it owns in fee simple at a commission project for comparably valued real property adjacent to the project. Such exchange will allow the Commission to straighten a boundary.

G. S. 139-24 provides "Watershed improvement districts organized under the provisions of this Article shall constitute a political subdivision of this State, and a public body corporate and politic, exercising public powers, and such watershed improvement district *shall have all of the powers of the soil conservation district or districts in which the watershed improvement district is situated. . . .*" (*Emphasis added.*)

G. S. 139-8(4) provides that among the powers of a soil conservation district is the power "to obtain options upon and to acquire by purchase, exchange, lease, gift, grant, bequest, devise, or otherwise any property, real or personal, or rights or interests therein. . . ."

G. S. 139-8(11) provides: "No provision with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to a district organized hereunder unless the legislature shall specifically so state.

No provision of Chapter 139 sets out the manner in which real

property must or may be exchanged. It seems clear from G. S. 139-8(11) that the Legislature intended to give the Commission broad powers in dealing with real estate. The lands exchanged should be of substantially equal value. It is suggested that such exchange should be based on competent appraisals of the land exchanged and to be acquired by the Commission and that such appraisals be made a permanent record of the Commission.

Robert Morgan, Attorney General
Millard R. Rich, Jr.,
Assistant Attorney General

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11 February 1971

Subject: Public Officers & Employees; County Commissioners; Power to Remove Officials When No Term By Statute; County Planning Board.

Requested by: Mr. William C. Reeves
Madison County Attorney

Question: May a member of a county planning board who was appointed for a term of five years by a prior board of commissioners be removed from office by the present board of commissioners when the statute, G. S. 153-9(40), does not fix the term for a definite time?

Conclusion: Yes.

As stated in *Kinsland v. Mackey*, 217 N.C. 508, at 511, 512:

"The applicable rule, which appears to have been generally and almost universally adopted, is that where the term of office of a public officer is not prescribed by law, the office is held during the pleasure of the authority making the appointment. Likewise,

the general rule is that in the absence of all constitutional or statutory provision for the removal of such public officers, the power of removal is incident to the power of appointment, and is discretionary and may be exercised without notice or hearing. 22 R.C.L. 562; 19 R.C.L. 935; 43 C.J., 641. *McQuillan on Municipal Corporations* (2nd Ed.), Revised Vol. 2, p. 228, sec. 509 (489), Annotations 91 A.L.R., 1097.

"These general rules have been applied in well considered decisions by the courts of many states to cases in which the appointing authority has attempted to fix a definite term for the particular office. See Annotation 91 A.L.R. 1097. The trend of these decisions is that the implied power of the appointing authority to remove at pleasure an officer whose term of office is not prescribed by law cannot be contracted away so as to bind the appointing authority to retain an appointee for a fixed period.

"Where an office is held during the pleasure of the appointing authority, a removal may be either express, by notification to the officer, or implied, by the appointment of another person to the same office. 19 R.C.L., 935.

". . . And this is true, even though it be conceded that the board by resolution specified that the appointment be for a definite term. Hence, in the absence of constitutional or statutory provision therefor, the board, under the power of removal incident to the power of appointment, had the power to remove the defendant at any time without cause, notice or hearing. The appointment of another, the plaintiff, to the position of tax collector, of which fact defendant had notice, operated as a removal of defendant."

G. S. 153-9(40) authorized the county commissioners to appoint a planning board but is silent as to the terms of the members. Thus under the rule stated in the above case, members of the planning board serve at the will of the appointing body.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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11 February 1971

Subject: Courts; Costs; Advance Costs: Exemptions of Counties and Municipalities; County Hospital As Instrumentality of the County.

Requested by: Mr. William L. Mills, Jr.
Attorney for Cabarrus Memorial Hospital

Question: Does Cabarrus Memorial Hospital come within the exemption provided in G. S. 7A-317 which provides that counties will not have to pay advance costs in suits filed in the General Court of Justice?

Conclusion: Cabarrus Memorial Hospital is an instrumentality of the county, supported by county funds, and would come within the exemption of G. S. 7A-317 providing that counties are not required to pay advance costs.

The inquiry indicates that Cabarrus Memorial Hospital has been advised by the clerk's office that as to any suits filed on accounts, or other suits filed in the General Court of Justice by the Hospital, advance costs will have to be paid. The inquiry from the attorney for the Hospital indicates that a previous Attorney General opinion to Mr. Ratchford, Clerk of Superior Court of Cabarrus County, on the 17th of May, 1965, indicated that the county was exempt under the provisions formerly contained in Chapter 2 of the General Statutes. G. S. 7A-317 now provides:

> "Counties and municipalities are not required to advance costs for the facilities fee, the General Court of Justice fee, the miscellaneous fees enumerated in G. S. 7A-308, or the civil process fees enumerated in G. S. 7A-311."

The inquiry indicates that unless the county attorney would bring the suits, the exemption would not be allowed. In checking with the Administrative Office of the Courts, we find that the rule is

that if the county is not the actual party, it is assumed that the exemptions would not be allowed since determining in each case whether the exemption would not apply would be a very difficult matter.

Nonetheless, the conclusion is here reached that Cabarrus Memorial Hospital is an instrumentality of the county and would therefore be eligible for the exemption from advance costs.

Chapter 307 of the Public-Local Laws of 1935 was the enabling legislation for the Hospital, which established by the board of county commissioners and the Act provides for a bond issue and a tax levy to support the Hospital's operation. The Cabarrus County Commissioners do not acutally operate the Hospital themselves but that responsibility is delegated to a board to trustees which is appointed by the county commissioners. Since the Hospital is supported by a local tax levy and since the administration of the Hospital is on delegation of the authority from the county commissioners to a board of trustees of the Hospital, we are of the opinion that the Hospital is an instrumentality of the county just as is the county social services department, the county board of health, or any other county agency. Only when the county would establish a lease arrangement with some non-profit corporation, whereby operation of the Hospital would be conducted by some independent entity, would it cease to be an instrumentality of the county for these purposes. In the present instance, fortifying our opinion that this is a county instrumentality, is the fact that the county itself would pay advance costs in the suits which the Hospital contemplates filing. Since this is a proper expenditure of the county, this would further buttress the finding that the Hospital is an instrumentality of the county.

It is therefore proper for the Hospital to file suits in the General Court of Justice without paying advance costs.

Robert Morgan, Attorney General
(Mrs.) Christine Y. Denson,
Assistant Attorney General

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11 February 1971

Subject: State Departments, Institutions & Agencies; State Highway Commission; Eminent Domain; Relocation Assistance; Litigation Expense; Purchase of Remnants

Requested by: Mr. George S. Willoughby, Jr.
State Highway Administrator

Question: To what extent is the State Highway Commission able to comply with Sections 301, 302, 303 and 304 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970?

Conclusion: The State Highway Commission is able to comply with all the provisions except Subsection 9 of Section 301 and Section 304.

The State Highway Commission is required by Section 305 of the "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970" to furnish the Federal Highway Administration assurances that it will comply with the uniform real property acquisition policy to the greatest extent practicable under State law, prior to approval of any federal aid highway program. The Federal Highway Administration by letter of February 5, 1971, requested that the assurances from the State Highway Commission include a legal opinion from the Chief Legal Officer with appropriate citations on those provisions the State is unable to comply with under existing law.

Section 301 - UNIFORM POLICY ON REAL PROPERTY ACQUISITION POLICY

Subsection:

(1) The State Highway Commission can comply with this provision.

(2) The State Highway Commission can comply with this provision.

(3) The State Highway Commission can comply with this provision.

(4) The State Highway Commission can comply with this provision.

(5) The State Highway Commission can comply with this provision.

(6) The State Highway Commission can comply with this provision.

(7) The State Highway Commission can comply with this provision.

(8) The State Highway Commission can comply with this provision.

(9) I am of the opinion that the State Highway Commission may not in all cases be able to comply with Section 301(9) as the Commission is authorized to acquire remnants only when it is in the best interest of the public to do so. Section 301(9) provides: "If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the Federal (State) agency concerned shall offer to acquire the entire property". North Carolina General Statute 136-19 provides "The Commission may, in its discretion, with the consent of the landowner, acquire in fee simple an entire lot, block or tract of land, if by doing so, the interest of the public will be best served, even though said lot, block or tract is not immediately needed for right of way purposes".

Section 302 - BUILDINGS, STRUCTURES AND IMPROVEMENTS

Subsection:

(a) The State Highway Commission can comply with this provision.

(b) The State Highway Commission can comply with this provision.

Section 303 - EXPENSES INCIDENTAL TO TRANSFER OF TITLE

Subsection:

(1) The State Highway Commission can comply with this provision.

(2) The State Highway Commission can comply with this provision.

(3) The State Highway Commission can comply with this provision.

Section 304 - LITIGATION EXPENSE

Subsections (a), (b) and (c): The State Highway Commission can comply with Section 304(a)(2) to the extent that the court is authorized to award the property owner reasonable attorneys' fees in cases where the State Highway Commission abandons the condemnation action. I am of the opinion that the State Highway Commission cannot comply with the remaining provisions of Subsections (a), (b) and (c) of Section 304 of the Act. Section 304(a) provides that the court shall award the owner such sum as will in the opinion of the court reimburse the owner for reasonable cost including attorneys, appraisals and engineering fees actually incurred if (1) the court determines that a condemnation is unauthorized or (2) the State abandons a condemnation or (3) the property owner brings an inverse condemnation action and obtains an award of compensation.

At common law costs were unknown and were not recoverable by either party in any action--real, personal or mixed. 20 Am. Jur. 2d, Costs, Sec. 4 at page 7; *Chadwick v. Insurance Company*, 158 N.C. 380 at page 382; 74 S.E. 115 (1912). North Carolina still has the common law in effect except where modified by statute. G. S. 4-1. North Carolina has modified the common law rule by enacting Chapter 6 of the General Statutes relating to costs and by enacting G. S. 136-19 and G. S. 1-209.1. G. S. 136-19 provides that "The State Highway Commission shall pay all costs taxed by the court". Cost does not mean expense. *Nicholes v. Goldston*, 231 N.C. 581 at page 584, 58 S.E. 2d 348 (1950).

Ordinarily, attorneys' fees are not recoverable as an item of damages or a part of costs in litigation. *State v. Aircraft Corporation*, 9 N.C. App. 557 at page 563; *Parker v. Realty Company*, 195 N.C. 644 at page 646. Our Supreme Court has held that counsel fees, though an expense, may not be taxed as part of the costs in condemnation proceedings, except those fees awarded to counsel protecting the rights of unknowns pursuant to specific statutory authorization.

Light Company v. Creasman, 262 N.C. 390 at page 403; 137 S.E. 2d 497 (1964). However, if the condemnation proceeding is abandoned, G. S. 1-209.1 specifically authorizes the court to award reasonable attorneys' fees.

G. S. 6-52 provides that experts, when compelled to attend and testify shall be allowed such compensation and mileage as the court in its discretion may order. The compensation is for attending and testifying in court. Other than the provisions for the payment of expert witness fees and the right to attorneys' fees for the protection of the rights of unknowns, and the authorization for attorneys' fees provided for in G. S. 1-209.1, there is no statutory authorization for the payment of the costs of engineering, appraisal or attorneys as a part of court costs. Therefore, with the exception of attorneys' fees authorized to be awarded pursuant to the provisions of G. S. 1-209.1, the court has no authorization to award such costs upon a final judgment finding that the Highway Commission cannot acquire property, nor upon abandonment of a condemnation action, nor in cases of inverse condemnation. (20 Am. Jur. 2d, Costs, Sec. 5 at page 8; *State v. Patterson*, 224 N.C. 471, 32 S.E. 2d 380 (1944); *Light Company v. Creasman*, 262 N.C. 390 at page 403, 137 S.E. 2d 497 (1964).)

Robert Morgan, Attorney General
R. Bruce White, Jr.,
Deputy Attorney General

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17 February 1971

Subject: Taxation; Real Estate Excise Stamp Tax; Husband-Wife Conveyances; Gifts; G. S. 105-228.28, 105-228.29

Requested by: Mr. Mark Stuart
Guilford County Register of Deeds

Question: When a husband and wife separate and the husband conveys to the wife property held

as tenants by the entirety as part of a property settlement with the wife, is the conveyance subject to the excise stamp tax on conveyances.

Conclusion: When a husband and wife separate and the husband conveys to the wife property held as tenants by the entirety as part of a property settlement with the wife, the conveyance is subject to the excise stamp tax on conveyances.

A husband and wife separate. The husband as part of a property settlement with the wife conveys his interest in certain real property held by them as tenants by the entirety. The wife in return conveys her interest in certain property to her husband and gives up certain legal rights incident to the marriage relationship.

Under the above circumstances, the conveyance by the husband of his interest in the entirety property appears to be a taxable conveyance under the excise stamp tax on conveyances. G. S. 105-228.28 provides:

> "The provisions of this article shall apply to every person, firm, corporation, association, society or organization conveying an interest in real property located in North Carolina other than a governmental unit and instrumentalities thereof."

G. S. 105-228.29 provides:

> "The provisions of this article shall not apply to transfers of an interest in real estate by operation of law, by lease for a term of years, by or pursuant to the provisions of a will, by intestacy, *by gift*, by merger or consolidation, or by instruments securing indebtedness, or *any other transfer where no consideration in property* or money is due or paid by the transferee to transferor." (*Emphasis added.*)

When a husband and wife separate and consequent thereto or in

contemplation thereof conveyances of real property are made, there immediately arises the question as to whether the conveyance is subject to the excise stamp tax on conveyances. The rules of law must be carefully analyzed. G. S. 105-228.29 provides that gifts and conveyances without consideration in money or property are exempt from the tax. At common law the conveyance of real property between spouses raises certain presumptions, which one authority explains:

> "Where the husband furnishes the money and the title is placed in the wife's name, there is not created a resulting trust but the presumption of a gift to the wife. This presumption arises out of the relationship of the parties and is based upon the legal and moral obligation of the husband to support his wife. 'But this is only the presumption of a fact the law makes, which may be rebutted by evidence, and, when this is done, the parties then stand as if they were not man and wife, that is, they stand as other parties, and the general rule prevails.'....
>
> "Where the wife furnishes the money and the title is placed in the husband's name, there is created the presumption of a resulting trust in favor of the wife." Lee, *North Carolina Law of Trusts*, at p. 16 (1968).

The conveyance from the husband to the wife is considered a gift because of the incidents of the marital relationship. The incidents of the marital relationship are protected by law, and these property rights can be barred only as provided by law, Cf. "Acts Barring Property Rights" G. S. 31A-1 et. seq. A conveyance by the wife to the husband is presumed to be a resulting trust rather than a gift. At common law under the doctrine of "coercion" the wife was deemed to be under the direction and control of the husband, Lee, *North Carolina Family Law*, §107 (1963) and *Perkins on Criminal Law* at pp. 796 et. seq. (1957).

The presumption raised, as noted above, is one of "fact" and not of "law". A presumption of "fact" may be rebutted. It is what the law presumes when no evidence to the contrary is presented.

The question clearly presented at this point is "was there, in fact, a gift made or a conveyance without consideration in property or money?" If the conveyance was not a gift, nor was it a conveyance without consideration in property or money, the presumption of a gift is rebutted.

In the situation at hand, we are confronted with a situation where the husband and wife may do one of the following:

> (1) Make a property settlement, each taking absolute title to certain jointly-held property in settlement, in whole or in part, of their claims to the specific property.
>
> (2) Make a settlement of "marital rights". In this type of settlement there is an agreement that certain property will be exchanged, either in lump sum or by periodic payments, to the respective spouses as per the agreement in settlement of the "rights incident to marriage" or marital rights. This usually includes releases to all rights and claims in the other's estate. Cf. G. S. 31A-1 et. seq.
>
> (3) Make a valid gift.
>
> (4) Making a settlement combining (1), (2) and (3), or any combination thereof.

It is clear that conveyances pursuant to situations numbered (1), (2) and (4) are subject to the excise stamp tax on conveyances. Number (4) is not subject to the tax to the extent there is a valid gift. Number (3) as a gift, is clearly not subject to the tax, G. S. 105-228.29. It should be observed that the "separation agreement" or as sometimes termed a "deed of separation" is not subject to the tax unless the instrument itself effects the conveyance.

In conclusion, it is clear that when a husband and wife separate and the husband conveys to the wife his interest in real property held as tenants by the entirety as part of a property settlement with the wife, the conveyance is subject to the excise stamp tax on conveyances. The husband may still make a bona fide and valid

gift to his wife of real property that will not be subject to the tax.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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18 February 1971

Subject: State Departments, Institutions & Agencies; State Highway Commission; Department of Archives and History; Appropriation for Purposes of Purchasing Historical Markers

Requested by: Mr. George S. Willoughby, Jr., State Highway Administrator

Question: Can part of the $10,000 highway maintenance funds authorized for the purchase of historical markers be used for the construction and repair of map marker bases?

Conclusion: No. The Highway funds authorized for the purchase of historical markers may not be used for the construction and erection of masonry bases.

In a letter of February 3, 1971, the State Highway Administrator requested an opinion as to whether or not highway funds authorized under G. S. 136-43 for the purchase of historical markers may be used for the purpose of construction and repair of map marker bases. These marker bases are constructed of masonry material. According to an attached memorandum to J. O. Litchford, Traffic Engineer, from the Department of Archives and History, funds for the

construction of these marker bases have in the past been provided by local, individual or civic organizations. It is now becoming difficult to raise local funds for this purpose.

G. S. 136-43 provides that "the State Highway Commission is hereby authorized to expend not more than ten thousand dollars ($10,000.00) a year *for the purpose of purchasing historical markers* to be erected by the State Highway Commission. . .". It further provides that the Department of Archives and History shall deliver the completed markers to the Highway Commission. I am of the opinion that this statute authorizes the use of the $10,000 only for the purchase of historical markers, and the fund may not be used for the construction and maintenance of the masonry bases.

G. S. 121-2(8) provides that the State Department of Archives and History ". . .shall have all markers manufactured, and when completed, each marker shall be delivered to the State Highway Commission for erection under the provisions of G. S. 136-42 and G. S. 136-43". G. S. 136-42 provides that the Commission is authorized to cooperate with the State Department of Archives and History in marking historic spots along the state highways. When G. S. 136-42 is read in conjunction with G. S. 121-2(8) and G. S. 136-43, it appears that it was the intent of the Legislature that the Highway Commission should provide the labor and materials necessary for the erection of the historical markers. However, such cost should not be charged against the $10,000 fund authorized for the purchase of historic markers.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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23 February 1971

Subject: Motor Vehicles; Breathalyzer Tests; Right to Counsel; 30 Minutes Delay

Requested by: LTC Charles B. Pierce

N. C. State Highway Patrol

Questions: (1) May counsel for defendant delay the breathalyzer testing procedure for more than 30 minutes in order to converse with his client?

(2) Should counsel for defendant be allowed to take defendant out of the arresting officer's and operator's view for the purpose of consultation prior to the administering of the breathalyzer test.

Conclusions: (1) No.

(2) No.

With regard to Conclusion 1, G. S. 20-16.2(a) states in part:

> ". . . . Before any of the tests shall be administered, the accused person shall be permitted to call an attorney and to select a witness to view for him the testing procedures; providing, however, that the testing procedures shall not be delayed for these purposes for a period of time of over thirty minutes from the time the accused person is notified of these rights."

In our opinion, the testing procedures cannot be delayed more than 30 minutes for the purpose of obtaining counsel or witnesses. The 30 minutes time limitation begins to run only after defendant has been effectively warned of his rights to counsel and to select a witness; that is, a means of communication must be available to the defendant at the time he is advised of his such rights.

As to Conclusion 2, the defense counsel should be permitted to talk with his client out of the hearing of the officers. This does not require, however, that such consultation take place out of sight of the officers prior to the testing procedures as such could defeat the purpose thereof.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

2 March 1971

Subject: Municipalities, Water and Sewer Systems; City Limits; Extension of Water Service Beyond.

Requested by: Representative Colon Blake, Montgomery County

Question: How may a municipality finance the extension of water lines outside the boundaries of the municipality which are extended purely to produce a profit for the municipality?

Conclusion: Funds not derived from taxation and free from other legal commitment (for example, a surplus received from a municipal water system in excess of the interest and principal on water bonds due in the applicable fiscal year) may be used to finance the extension of water lines outside the city limits, purely to provide a profit for the municipality.

Article VII, Section 6 of the present North Carolina Constitution provides:

> "No county, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of same except for the necessary expenses thereof unless approved by a majority of those who shall vote thereon in any election held for such purpose."

Interpreting this provision, our Supreme Court stated:

> "Municipalities have legislative permission to extend their sewer and water lines beyond corporate boundaries. G. S. 160-239 and G. S. 160-255. Such

> extensions may be made either because necessary to the effective operation of the improvement within the city or to provide services for a profit beyond the corporate limits. Bonds for the latter purpose may be issued only when the electorate has expressly so authorized." *Eakley vs. Raleigh*, 252 N.C. 683, 688, 114 S.E. 2d 777 (1960).

Thus, it would appear quite clearly that extension of water lines outside the city limits purely to provide a profit would not be a necessary expense within the meaning of the above quoted section of the Constitution.

In *Dennis vs. Raleigh*, 253 N.C. 405, 116 S.E. 2d 923, our Supreme Court construing an ordinance appropriating funds from sources other than ad valorem taxes held that no tax funds, ad valorem or otherwise, could be used for non-necessary expenses.

Further, a town cannot make a rightful outlay of its tax revenues unless the outlay is explicity or implicitly authorized by statute. Thus, our Supreme Court has held that when there was no statute authorizing the Town of Burlington to use its tax revenues for the payment of expenses incident to the ordinary corporate activities of the Chamber of Commerce of such City, aside from constitutional consideration, such expenditure was not a valid exercise of municipal powers. *Horner vs. Chamber of Commerce*, 231 N.C. 440, 57 S.E. 2d 789 (1950).

A surplus, however, derived from the operation of the city water system may be used to extend water lines beyond the city limits.

The position of the Attorney General's office for many years is well summarized in the following quotation from an Institute of Government publication prepared by J. A. McMahon entitled "Sources of Municipal Revenue" (1953) pp. 42-44:

> "A question arises as to the use of income from such utilities. G. S. 160-257 requires cities and towns to 'provide for the proper upkeep of the waterworks system and an amount necessary for the enlargement of the waterworks system' before turning over to other

department money received from the operation of the system. Thus, as far as a waterworks system goes, this section implies that net profits (after deducting the cost of operation and enlargement to the system) may be used to finance other municipal activities. The provisions of another section, however, are relevant: G. S. 160-397 provides that 'so much of the net revenue derived by the municipality in any fiscal year from the operation of any revenue producing enterprise owned by the municipality after all expenses of operating, managing, maintaining, repairing, enlarging and extending such enterprise, shall be applied, first to the payment of the interest, payable in the next succeeding year on bonds issued for such enterprise, and next, to the payment of the amount necessary to be raised by tax in such succeeding year for the payment of the principal of said bonds'. Suppose, for example, that the total revenue from the operation of a water system amounted to $100,000 in fiscal year 1952-53, and the cost of operating and enlarging the system in that fiscal year amounted to $80.000. The net revenue would have to be applied first to the payment of interest payable on any bonds issued for the water system coming due in fiscal year 1953-54, and second to the payment of principal on such bonds falling due in 1953-54. Suppose, further, that interest and principal due in fiscal year 1953-54 amounted to $10,000. Reading G. S. 160-397 and 160-257 together, it would appear that the remaining $10,000 could then be spent for other purposes. Since the net revenue from the water system comes from water rates and is not a tax, it would seem that such net revenues could be used to finance a non-necessary expense as well as a necessary expense, and the Attorney General has so ruled."

Robert Morgan, Attorney General
Isham B. Hudson, Jr.,
Assistant Attorney General

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2 March 1971

Subject: Courts; Appeals, Criminal; District to Superior Courts; Jurisdiction of Superior Court Over Misdemeanors; G. S. 7A-271(a)(3), (4).

Requested by: Mr. Frank J. Yeager, Solicitor
21st Solicitorial District

Questions: (1) When defendant is bound over to superior court upon a warrant charging felonious larceny of an automobile and the grand jury returns a three count indictment charging felonious larceny (automobile), felonious receiving of stolen goods (automobile), and misdemeanor temporary larceny of an automobile, does the superior court have jurisdiction to accept a plea of guilty to the misdemeanor under G. S. 7A-271(a)(4)?

(2) When defendant is bound over to superior court upon a warrant charging felonious larceny of an automobile and the grand jury returns a three count indictment charging felonious larceny (automobile), felonious receiving of stolen goods (automobile), and misdemeanor temporary larceny of an automobile, does the superior court have jurisdiction to try the defendant upon a plea of not guilty to all three offenses charged in the indictment under G. S. 7A-271(a)(3)?

Conclusions: (1) The superior court has jurisdiction to accept a plea of guilty under G. S. 7A-271(a)(4) to the misdemeanor if such plea is tendered and accepted in lieu of proceeding to trial on the felony charges.

(2) The superior court has jurisdiction to try defendant upon all three offenses charged in the indictment under G. S. 7A-271(a)(3) if all offenses arose out of the same act or transaction or two or more acts or transactions connected together.

With regard to conclusion (1), G. S. 7A-271(a)(4) authorized the superior court "to accept a plea of guilty. . ." (to a misdemeanor) which plea ". . .is tendered in lieu of a felony charge". Thus, the solicitor may elect not to proceed with the felony charges and to accept a plea to the misdemeanor.

With regard to conclusion (2), G. S. 7A-271(a)(3) authorizes the superior court to try a misdemeanor "which may be properly consolidated for trial with a felony under G. S. 15-152". G. S. 15-152 sets up the "same transaction" rule with regard to determining proper consolidation.

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

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2 March 1971

Subject: Taxation; Ad Valorem; Exemptions; Elks Club; Adjacent Land; Swimming Pool; G. S. 105-296(6).

Requested by: Mr. D. R. Holbrook
Administrative Officer
State Board of Assessment

Question: Is a swimming pool and bath house owned by an Elks Club, located adjacent to the building in which the Club meets and conducts its activities, exempt from taxation when the pool is used only by

members, their families and guests?

Conclusion: A swimming pool and bath house owned by an Elks Club, located adjacent to the building in which the Club meets and conducts its activities, is exempt from taxation when the pool is used only by members, their families and guests.

An Elks Club owns a swimming pool and bath house adjacent to the building where they meet and conduct their activities. Members are entitled to use the facilities free of charge but if guests or others in their families use the pool, the members are required to pay a nominal fee. Are the pool and bath house exempt from ad valorem taxes?

Article 5, section 2(3) of the North Carolina Constitution and G. S. 105-296(6) provide the authorization for the exemption of certain benevolent, patriotic, historical, and charitable associations. The exemption has three requirements as provided in G. S. 105-296(6), which are: (1) presence of a building and occupancy; (2) exempt association; and (3) qualifying use. The exemption extends to the building, the land actually occupied thereby together with such additional adjacent land as may be necessary for the convenient use of the building thereon.

The Elks Club is an exempt association. A building is present and the building is used for lodge purposes. *Ange v. Woodmen*, 171 N.C. 40 (1916); Attorney General Opinion to Mr. J. Toliver Davis on October 26, 1966; Attorney General Opinion to Mr. Harley B. Gaston on March 25, 1960; Attorney General Opinion to the Honorable H. C. Dockery on October 14, 1953; and Attorney General Opinion to the Honorable Nat S. Crews on August 13, 1952. There is no question as to the exemption of the building here.

The question presented is whether the swimming pool may be exempt as being land adjacent to the building and necessary for the convenient use thereof. Language similar to the language used in G. S. 105-296(6) was construed in *Harrison v. Guilford County*, 218 N.C. 718 (1940). The court stated as follows:

". . . What is meant by adjacent land? Webster, in defining the word 'adjacent', says: 'objects are adjacent when they lie close to each other, but not necessarily in actual contact; as adjacent fields, villages'. When given this ordinary meaning, adjacent land which is reasonably necessary for the convenient use of the building wholly and exclusively for religious purposes must lie close to but not necessarily in contact with the land on which the building is situated.

"The lot in question is stated to be four or five blocks away, but other adjoining lands were not available. The agreed facts show that the lot is reasonably necessary for the convenient use of the church, and is wholly and exclusively used for religious worship." at p. 722.

This decision is indicative of the broad construction that might be given to the statute in question here. In an opinion of this office to Mr. E. P. Dameron on April 4, 1962, the following view was expressed:

"It appears to me that the roadway which takes up 10 acres of land is necessary for the convenient use of the building and, also, that the 20 acres devoted to picnic and recreation area, if used exclusively by members of the lodge and their guests and not let out on a fee or rental basis for parties or individual non-members, might be reasonably brought within the exempt status."

The Dameron Opinion, supra, illustrates the broad construction given to the term "adjacent". Cf. Attorney General Opinion to the Honorable Marsden Bellamy on November 5, 1951, (also discussing buildings under construction).

In the instant case, the pool and bath house are adjacent to the building used for lodge purposes by the Elks Club. Use of the pool is limited to members, their guests, and family. The pool and bath house fall within the provisions of G. S. 105-296(6) and are, therefore, exempt from taxation.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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4 March 1971

Subject: Taxation; Privilege License Tax; Duplicating Machines and Copiers; G. S. 105-51

Requested by: Mr. W. C. Pickett, Jr., Director
Privilege License Tax Division
N. C. Department of Revenue

Question: Does a business machine designated as a "3M Copier" or a "Thermo-Fax Copier" or otherwise designated as a "copier" or "copying machine" qualify as a "duplicating machine" so as to make the seller of such copier machine subject to the privilege license tax provided in G. S. 105-51?

Conclusion: A business machine designated as a "copier" or "copying machine" qualifies as a "duplicating machine" within the meaning of the latter term as used in G. S. 105-51 so as to make the seller of such copier or copying machine subject to the privilege license tax provided in G. S. 105-51.

G. S. 105-51 provides in pertinent part as follows:

> "Every person, firm or corporation engaged in the business of selling and/or delivering and/or

> renting cash registers, typewriters, adding or bookkeeping machines, billing machines, check protectors . . . addressograph machines, multigraph and other duplicating machines, . . . shall apply for and procure from the Commissioner of Revenue a State license for each place where such business is transacted in this State, and shall pay for such license a tax of ten dollars ($10.00)."

The use of the term "duplicating machines" in conjunction with other types of business machines in G. S. 105-51 would appear indicative of the legislative intent to cover or bring within the provisions of this taxing statute all reproductive type business machines. The term "duplicate" is defined in *Black's Law Dictionary*, Fourth Edition, as follows:

> "When two written documents are substantially alike, so that each might be a copy or transcript from the other . . . . That which exactly resembles or corresponds to something else; another, correspondent to the first; hence a copy."

It has been held that a "duplicate" is simply a copy of the original. *Nickle v. Lewis*, Iowa, 272 N.W. 525; *Radford v. Dixon County*, 45 N.W. 275. Thus, the term "duplicating machines", within the apparent intended meaning and usage of the term in this statute, is synomymous with, or broad enough to cover, "copiers" or "copying machines".

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General

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4 March 1971

Subject: State Departments, Institutions &

Agencies; State Highway Commission; Contracts; Public Buildings; Work Performed by Highway Commission Forces.

Requested by: Mr. John Davis
Chief Engineer
State Highway Commission

Question: What are the requirements for the letting to contract portions of a capital improvement project duly authorized for construction by State Highway Commission forces in cases where the State Highway Commission does not have sufficient personnel, such as bricklayers and plumbers, on its payroll to perform part of the work?

Conclusion: The provisions of Article 8 of Chapter 143 of the General Statutes, relating to public building contracts, applies to the State Highway Commission in the construction of capital improvements except where specifically excepted. G. S. 143-134. The provisions for Article 8 do not apply to construction and repair of such highway buildings performed by Commission employees (a) when the Director of the Budget determines it is more economical to do so -- there are no limits as to the amount, G. S. 153-134 or, (b) when the Director of the Department of Administration approves it – up to $25,000.00. G. S. 143-135. The following paragraphs 1 and 2 shall apply only when a construction or repair project by the Commission comes within the exceptions of G. S. 143-134 or G. S. 143-135 and it is necessary to have a portion of the project performed by work forces not on the

Highway Commission payroll, which outside work is subject to the provisions of Article 8 of Chapter 143.

1. G. S. 143-128, Separate Specifications. Heating/air conditioning; Plumbing; Electrical installations; Refregeration.

(a) In cases where the entire cost of the construction or repair (including work performed by the State agency forces and outside work forces) exceeds $20,000.00 and when the work in any one of the classifications listed in G. S. 143-128 exceeds $2,500.00 but is less than $7,500.00, separate specifications and bids as prescribed by G. S. 143-128 are required for such work described for each of those classifications of work let to contract.

(b) In the cases where the entire cost of construction or repair (including work performed by State agency forces and outside forces) exceeds $20,000.00 and whenever the amount of work to be performed by outside forces exceeds $7,500.00 in either of the categories listed in Section 128 of Chapter 143, the provisions of G. S. 143-129 relating to bidding and the letting of contracts for work must be followed for work in that category which exceeds $7,500.00.

2. Bidding requirements of G. S. 143-129. Applicability to outside work other than that set out in G. S. 143-128.

(a) Excepting work let to separate contracts pursuant to G. S. 143-128, in

those cases where the work to be performed by outside forces does not exceed $7,500.00, the outside work may be let to contract by the informal bids.

(b) Excepting outside work let to separate contract pursuant to G. S. 143-128, where the outside work exceeds $7,500.00 the formal bidding requirements of Section 129 must be complied with for the outside work to be performed.

(c) The contracts for outside work may be for furnishing labor alone or for labor and materials.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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8 March 1971

Subject: State Departments, Institutions & Agencies; State Highway Commission; Eminent Domain; Relocation Assistance.

Requested by: Mr. George S. Willoughby, Jr.
State Highway Administrator

Question: To what extent is the State Highway Commission able to comply with the Relocation Provisions of the Uniform Relocation Assistance and Real Property Acquisition Act of 1970?

Conclusion: The 1969 General Assembly of North Carolina passed legislation codified as Article 13 of Chapter 136 of the General

Statutes cited as the "Highway Relocation Assistance Act". This Act was passed pursuant to the requirements of the provisions of Section 30 of the Federal-aid Highway Act of 1968 in order to insure continued federal-aid for the construction of highways in North Carolina. The State Highway Commission can comply with the relocation provisions of the "Uniform Relocation Assistance and Real Property Acquisition Act of 1970" only to the extent that the requirements of the Act are set forth in Section 30 of the "Federal-aid Highway Act of 1968" as appears in Chapter 5 of Title 23, United States Code, prior to amendment by the Federal-aid Highway Act of 1970.

The State Highway Commission was requested by the Federal Highway Administration by a letter dated February 9, 1971, to furnish a statement as to the ability of the State Highway Commission to comply with the relocation assistance provisions of the "Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970". The Federal Highway Administration also requested that the statement "shall be supported by an opinion of the chief legal officer of the highway department in which he cites reasons and authorities supporting his conclusions for each representation of legal inability to comply".

Robert Morgan, Attorney General
R. Bruce White, Jr.,
Deputy Attorney General

Editor's Note: Remainder of this opinion is omitted because of its limited usefulness. Copies will be furnished upon request.

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10 March 1971

Subject: Criminal Law & Procedure; Appointment

of Counsel in Petty Misdemeanor Cases; Miranda Warnings in Petty Misdemeanor Cases.

Requested by: Mr. J. D. Myers
Statesville Chief of Police

Question: What is the application of the *Miranda* and *Escobedo* rulings in minor misdemeanor cases? Specifically, is there any legal requirement that a police officer advise a person of his rights in minor misdemeanor cases?

Conclusion: In the case of serious misdemeanors, regarded as serious offenses where authorized punishment exceeds six months imprisonment and $500.00 fine, counsel must be appointed for an indigent defendant as a matter of constitutional right. The Supreme Court has not decided whether counsel must be appointed for an indigent defendant in a misdemeanor case where the authorized punishment is less than six months imprisonment and a fine of less than $500.00. Except in routine and minor traffic offenses the *Miranda* warning should be given in misdemeanor cases.

In the case of *Escobedo v. Illinois*, 378 U. S. 478, 12 L. ed. 2d 977, 84 S. Ct. 1758, the Supreme Court of the United States by a five-justice decision held that the refusal of Illinois police, during an interrogation process conducted while the suspect was in custody, to grant his request to consult his attorney constituted a denial of his constitutional right to counsel. This was held to violate the Sixth Amendment to the Constitution as made obligatory upon the states by the Fourteenth Amendment. Such denial of counsel renders inadmissible in the state criminal trial any incriminating statement elicited by the police during the interrogation. The case was made applicable to the situation where the investigation has ceased to be a general investigation of an

unsolved crime and the Court further concluded: "We hold only that when the process shifts from investigatory to accusatory - - when its focus is on the accused and its purpose is to elicit a confession - - our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

In the case of *State v. Morris*, 275 N. C. 50, 59, Mr. Justice Huskins, writing for the Court, said:

> "We hold that defendant here, who is charged with a serious offense, has a constitutional right to the assistance of counsel during his trial in the Superior Court and that G. S. 15-4.1, insofar as it purports to leave to the discretion of the trial judge the appointment of counsel for indigent defendants charged with serious offenses, is unconstitutional. A serious offense is one for which the authorized punishment exceeds six months' imprisonment and a $500.00 fine."

Whether or not the court in its discretion is required to appoint counsel for every petty offense, such as routine traffic violations, or whether or not the court in its discrtion can appoint counsel for a misdemeanor which is not a serious offense but which does involve complex technicalities, as you will see, is not decided by the Court. We are advised that in the State some superior court judges are appointing counsel for misdemeanors that are not serious offenses and some judges are not making such appointments. Of course, in all these statements we are apeaking of indigent defendants.

In the case of *Miranda v. Arizona*, 384 U. S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, 10 ALR 3rd 974, the Supreme Court of the United States declared that the Fifth Amendment bars the use of exculpating or inculpating statements that stem from custodial interrogation without procedural safeguards that would secure the privilege against self-incrimination. The Court in substance required, where there is custodial interrogation, that there be given the four-fold warnings:

(1) He must be warned prior to any questioning that he has the right to remain silent;

(2) that anything he says can be used against him in a court of law;

(3) that he has the right to the presence of an attorney; and

(4) that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. If the police or peace officers are merely asking questions to determine whether a crime has been committed, or, if so, who committed it, and the person being questioned is free to go at any time, then this would be non-custodial. Of course, any of these rights can be purposefully and intelligently waived.

We think these warnings should be given in all misdemeanor cases except the most routine and casual offenses, such as minor traffic offenses. In 25 ALR 3d 1076, you will find a discussion of *Miranda* as applied to traffic offenses.

Robert Morgan, Attorney General
Ralph Moody,
Deputy Attorney General

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10 March 1971

Subject: Mental Health; Competency to Stand Trial, Commitment by District Court Judge. G. S. 122-83

Requested by: Honorable J. W. H. Roberts
Chief District Judge
3rd Judicial District

Questions: (1) Does G. S. 122-83 authorize the commitment by a court to a state hospital of a

person charged with a crime of the grade of misdemeanor and found not competent to stand trial?

(2) Does G. S. 122-83 give district court judges the authority to commit defendants found not competent to stand trial?

Conclusion: (1) G. S. 122-83 and G. S. 122-84 must be construed as being in pari materia and taken together it is clear that the sections are applicable only to people charged with a high degree of crime, such as murder, rape or other crimes of a class which may be dangerous to the public or individuals.

(2) An adjudication of a person's competency is a proceeding in personam and of a civil nature. Absent a specific legislative grant, judges of the district court do not have jurisdiction over such a proceeding, and therefore district court judges do not have the authority to commit to state hospitals pursuant to G. S. 122-83 or G. S. 122-84.

The majority of the sections which comprise Article 11 of Chapter 122 of the General Statutes were enacted in 1899 and exist today in essentially the same form. Generally, it seems to have been the intention of the Legislature in 1899 to make special provision for persons charged with *certain* crimes and found unable to plead, and for persons charged with certain crimes and found not guilty by reason of insanity.

Thus, G. S. 122-84 provides that any person charged with the commission of crimes of a highly dangerous nature such as murder, attempted murder, rape, attempted rape, arson, etc. and who is either found not guilty of such crime by reason of insanity, or found to be incompetent to plead, may be committed by the trial court judge to the hospital designated in G. S. 122-83.

G. S. 122-85 (1899) provided that *all* convicts becoming mentally

ill after commitment to any penal institutuion shall be admitted to the hospital designated in G. S. 122-83.

G. S. 122-86 (1899) provides that no person acquitted of a *capital felony* on the ground of mental illness and committed (pursuant to the procedure set out in G. S. 122-84) to a hospital designated in G. S. 122-83 shall be discharged therefrom except under certain conditions.

Finally, G. S. 122-83 provides in pertinent part as follows:

> "All persons who may hereafter commit crime while mentally ill, and all persons who, being charged with crime, are adjudged to be mentally ill at the time of their arraignment,. . .shall be sent by the court before whom they are or may be arraigned for trial, when it *shall be ascertained by due course of law* that such person is mentally ill and cannot plead, to Dorothea Dix Hospital, . . .or to Cherry Hospital. . . ."

A close reading of Article 11 of Chapter 122 discloses that it is generally intended to provide a special place for confinement for designated classes of mentally ill persons who might present a special custody problem, or who might be especially dangerous. In all cases but one the jurisdiction and power to commit such persons remain with the clerk of the superior court, and the commitment is the regular judicial commitment pursuant to Article 7 of Chapter 122. The one exception is found in G. S. 122-84. This section provides for direct commitment by the trial court judge of a person in the class covered by this section. G. S. 122-83, in the opinion of this office, is not a further grant of jurisdiction or power, but rather is to be construed as a directory section which provides the specific hospital to which a person will be sent and how he shall be treated once it has been determined *by due course of law* pursuant to other statutes that the person is a proper subject for such commitment. That is to say, G. S. 122-83 does not authorize the commitment to Dorothea Dix or Cherry Hospital of all persons charged with any crime, but rather directs the place of commitment for those persons delineated by the subsequent sections, i.e., G. S. 122-84, 122-85, and 122-86. Thus the authority to commit is not provided by G. S. 122-83, but by these other sections, and this authority

attaches only to those cases specifically described in the subsequent sections.

The case of *State v. Craig*, 176 N. C. 740, 97 S. E. 400 (1918), speaking specifically to what is now G. S. 122-84, held the section to be penal in character and since it did provide for a restraint upon the liberty of an accused, held that it must be construed strictly in favor of the accused. In applying the required strict construction the *Craig* case held that G. S. 122-84 is applicable only to persons charged with a high degree of crime of such a nature as might be dangerous to the public or to individuals and that the use of the phrase "or other crime" does not bring under the purview of the statute crimes such as ". . .misdemeanors which are not necessarily and inherently vicious or threatening and may be and not infrequently are committed with very little demonstration of force."

To summarize, in regard to the question of what class of people can be committed directly by the trial judge pursuant to G. S. 122-84 to the hospitals designated in G. S. 122-83, inasmuch as the section providing for direct commitment by the court is penal in character, it must be strictly construed in favor of the person charged to include only those persons charged with crimes of the same nature and high degree as those specifically set out in the statute. This would include only felonies, the nature of which would pose a threat of physical harm to society or individuals.

Since a district court has no jurisdiction over the trial of felony charges, it must as of course follow that a district court judge does not have authority to commit a person charged with such a crime directly to the hospitals designated in G. S. 122-83. It should be observed, however, that the 1969 amendment to G. S. 122-91 does give the chief district court judge authority to order a person charged with the commission of a felony to a state hospital for a 60-day maximum period for the purpose of determining whether or not the accused is competent to stand trial. Also, any judge of the district or of the superior court, just as any other person who has knowledge of the facts, may file an affidavit with the clerk of court initiating judicial hospitalization proceedings pursuant to G. S. 122-60 against any person who has appeared before him who appears to be suffering from some mental illness or inebriety.

However, aside from the above reasoning, it is the opinion of this office that district court judges lack the authority to commit people to state hospitals, except for a chief district court judge pursuant to G. S. 122-91.

Article 4, § 10(3) of the North Carolina Constitution, as amended (1965), reads as follows:

> "Superior Court. Except as otherwise provided by the General Assembly the Superior Court shall have original general jurisdiction throughout the state. The Clerk of the Superior Court shall have such jurisdiction and powers as the General Assembly shall provide by general law uniformly applicable in every county of the State."

Article 4, Section 10(4) provides:

> "District courts; Magistrates. The General Assembly shall, by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and the powers of the district courts and magistrates."

Acts of the General Assembly prior to the constitutional amendment in 1965 gave to the clerk of superior court jurisdiction in incompetency proceedings, G. S. 35-2 et. seq., and in proceedings for the involuntary commitment of alleged mentally ill or inebriate persons to state hospitals, G. S. 122-60 et. seq. Since these legislative enactments are not inconsistent with the 1965 constitutional amendment, it is the opinion of this office that these statutes are still operative, and that they have the effect of relieving judges of the superior court of jurisdiction over such proceedings and placing that jurisdiction in the clerk of superior court.

An exception to the clerk of court's exclusive jurisdiction over proceedings for the involuntary commitment of a person to a state hospital is found in Article 11 of Chapter 122. G. S. 122-84 gives the trial judge in certain criminal actions jurisdiction to determine whether a person is competent to stand trial and to commit such person directly to a state hospital under certain conditions.

Proceedings for the purpose of determining competency and necessity of involuntary commitment to a state hospital are neither criminal nor civil actions as defined by G. S. 1-5 and 1-6, *In Re Dunn*, 239 N. C. 378, 79 S. E. 2d 921, and, therefore, must be at least in the nature of special proceedings, G. S. 1-3. Under the provision of Article 4, § 10(4) of the Constitution, district courts have only that jurisdiction and power prescribed by acts of the General Assembly. Thus the holding in *Perry v. Owens*, 257 N. C. 98, 125 S. E. 2d 287, that courts inferior to the superior court have only such jurisdiction and powers as are given them by statute, and these cannot be enlarged by implication, is still applicable even though this decision was prior to the 1965 constitutional amendment.

The General Assembly has not provided for jurisdiction in the district courts over special proceedings. To the contrary, G. S. 7A-246 provides that the superior court division is the proper division for the hearing and trial of all special proceedings. Thus, it is the opinion of this office that only the superior court has jurisdiction and power to determine competency to stand trial and to commit directly to state hospitals pursuant to G. S. 122-84.

Robert Morgan, Attorney General
L. Philip Covington,
Staff Attorney

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12 March 1971

Subject: Social Services; Medical Assistance; Obligation of Counties; Method of Raising Revenue

Requested by: Mr. Charles T. Johnson, Jr.
Warren County Attorney

Questions: (1) When, before the end of a fiscal year, a county has used all funds appropriated specifically for, or properly transferable for

use in, the medical assistance program provided for by Part 5 of Chapter 108 of the General Statutes, is the county under a legal duty to provide any more medical assistance funds for the fiscal year in question?

(2) When a county has expended all available funds for medical assistance purposes for a fiscal year, how may the county obtain additional funds for medical assistance purposes?

Conclusions:

(1) When, before the end of a fiscal year, a county has used all funds appropriated specifically for, or properly transferable for use in, the medical assistance program provided for by Part 5 of Chapter 108 of the General Statutes, the county is under a legal duty to provide additional medical assistance funds if needed for the fiscal year in question.

(2) When a county has expended all available funds for medical assistance purposes for any fiscal year, additional funds may be obtained by borrowing in anticipation of the collection of taxes, without limitation to tax collections anticipated in the remainder of the fiscal year in question.

Concerning the first question, G. S. 108-53, G. S. 108-55, G. S. 108-56 and G. S. 108-59 require the counties to levy taxes for medical assistance when a portion of that expense is assigned to them. Section 6 of Chapter 807 of the Session Laws of 1969, immediately following certain provisions of law concerning administrative funds, provides "The non-federal share of all other program costs will be divided equally between the State and the counties." The quoted provision is found in the appropriation for medical assistance.

In the case of *Martin v. Commissioners of Wake*, 208 N. C. 354, the Court said that ". . . it has been uniformly held in this State that the care of the indigent sick and afflicted poor is a proper function of the government of this State and that the General Assembly may by statute require the counties of the State to perform this function at least within their territorial limits." The Court said that "The statute does not violate Section 7 of Article VII of the Constitution of North Carolina, for the reason that the tax which the Board of Commissioners of Wake County is authorized to levy on the taxable property in Wake County *is for a necessary expense of the county* and therefore is valid,. . .although not approved by the majority of the qualified voters of the county." (Emphasis added)

The limitation of the total of State and county tax to the twenty cents on the $100 found in Article V, Section 6 of the Constitution is not applicable because that provision contains an exception in the case of property taxes levied for a special purpose and with the special approval of the General Assembly "which may be done by special or general act." It was recognized by the Court in the *Martin* case that a tax providing for the cost of medical treatment and hospital care for the indigent sick and afflicted poor of the county was for a special purpose. The special approval of the General Assembly in the case under consideration is given in G. S. 108-56(b) which is, in pertinent part, as follows:

> "The board of county commissioners may combine any or all of the separate special taxes for each program of public assistance and for the administrative expenses of such programs in place of levying separate special taxes for each item. This consolidated public assistance tax shall be sufficient, when combined with other funds available for use for public assistance expenses from any other source of county income and revenue (*including borrowing in anticipation of collection of taxes*), to meet the financial requirements of public assistance."

The limitation upon the increase of public debt without a vote of the people in this case under Article V, Section 4 of the Constitution is not applicable because that section provides that the

State shall have power to authorize the counties to contract debts and pledge their faith in credit "to supply a casual deficit", among other purposes.

Since the State has required the counties to pay a fixed share of medical assistance costs, and since G. S. 108-56 provides for borrowing by the counties in anticipation of the collection of taxes, and since Article V, Section 4 of the Constitution specifically authorizes a county "to borrow in anticipation of the collection of taxes due and payable within the fiscal year to an amount not exceeding 50 percentum of such taxes," it appears that the counties are legally obligated to pay their share of medical assistance costs and that they may borrow funds to do so if necessary.

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General
L. Philip Covington,
Staff Attorney

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12 March 1971

Subject: Jails; Transportation of Inmates to and From Court

Requested by: Commissioner Clifton M. Craig
State Department of Social Services

Question: Where an inmate is confined in a local non-county jail, does the county sheriff or the local police have the responsibility of transporting him to court?

Conclusion: The official who has physical custody of the prisoner has the responsibility of transporting him to court.

G. S. 162-22 provides that the sheriff shall have the care and custody

of the county jail in his county and that he shall be or shall appoint a keeper of the jail. The "keeper of the jail" is commonly referred to as the jailer. Since the jailer is under the office of the sheriff, either directly or indirectly, all necessary transportation of prisoners confined in county jails to the courts is provided by the sheriff's office.

G. S. 153-190.1 provides that it shall be the duty of the jailer of any county jail to receive and retain any prisoner brought to such jail by any law enforcement officer of such county, municipality in such county or any law enforcement officer of the state. ". . . provided, however, the foregoing provisions shall not be applicable with regard to prisoners arrested by law enforcement officers of a municipality which has its own jail. . . ." Since the jailer of the county jail, who is directly or indirectly under the sheriff's department, has no obligation to keep prisoners arrested by municipal officers of a municipality which has its own jail, it would logically follow that the sheriff's department would have no obligation to transport such municipally-confined prisoners from the municipal jail to the courts. Rather, the responsibility would lie with the chief law enforcement officer of the municipality which has physical custody of the prisoner.

This position is further supported by G. S. 160-18.1 which specifically authorizes municipal police officers to transport prisoners in their custody beyond the corporate limits of their municipality, and further authorizes such police to go beyond the city limits for the purpose of attending court. This would appear to be a legislative recognition of the fact that local police are obligated to transport prisoners in their custody for various reasons, including appearances in court, and this section was enacted to clearly authorize such transportation by the police officers beyond the limits of the municipality which they serve.

Robert Morgan, Attorney General
L. Philip Covington,
Staff Attorney

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12 March 1971

Subject: ABC Act; Disposition of Liquor Stolen from County ABC Store; G. S. 18-6; G. S. 18-13.

Requested by: Mr. W. A. Leathers, General Manager Durham County Alcoholic Beverage Control Board

Question: When tax-paid liquor has been stolen from a county or municipal ABC store and the burglars have been arrested and the whiskey seized in another county, may the ABC store recover the stolen liquor or must it be destroyed or turned over to the county commissioners as provided in G. S. 18-6 or 18-13?

Conclusion: When liquor is seized under either G. S. 18-6 or G. S. 18-13, upon conviction, the liquor is to be destroyed unless it be tax-paid liquor, in which event it is to be disposed of by turning it over to the board of county commissioners who shall turn it over to hospitals for medicinal purposes or sell it to legalized alcoholic beverage control stores within the State and the proceeds of the sale placed in the school fund of the county in which the seizure was made or destroyed. However, upon petition to the Court before the liquor has been sold or destroyed, the judge may return the liquor to the owner from whom it was stolen.

In *State v. Gordon*, 225 N. C. 241 and *State v. Hall*, 224 N. C. 314, our Supreme Court has held that under the Due Process Clause, anyone legally interested in the liquor may present his claim to the court and the court may return the liquor to the rightful owner if he was not connected with the violation of the

liquor laws. Thus, in our opinion, where liquor has been stolen from the ABC store and later recovered in the possession of the criminal, the court has the authority to return the liquor to the ABC store from which it was stolen upon a proper petition by the store to the court and upon a showing that the liquor was stolen and rightfully belongs to the ABC store.

The facts upon which this opinion is predicated are that 10 cases of whiskey were stolen from Durham County ABC store and 11 days later, three suspects were arrested in Wake County and convicted of felonious possession of stolen property. The District Court of Wake County confiscated the whiskey and turned it over to the Wake County Board of Commissioners pursuant to G. S. 18-13. The whiskey bore the county stamps and the store's identifying number.

Under such circumstances, the ABC store should appear in the court and petition the court for a return of the stolen merchandise upon the proper showing of ownership and that the property was stolen from the petitioner.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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12 March 1971

Subject: Criminal Law & Procedure; Special Police; Campus Police; Railroad Police; Private Detectives; Scope of Authority of Arrest; Carrying Concealed Weapons; Chapter 74A, General Statutes of North Carolina

Requested by: Mr. W. I. Thornton, Jr.
Assistant Greensboro City Attorney

Question: (1) Do campus police officers employed by State educational institutions have

authority to investigate traffic and criminal cases occurring on campus?

Conclusion: (1) Yes.

Campus police officers, appointed under Chapter 74A of the General Statutes, have all the powers of municipal and county police officers to make arrest for both felonies and misdemeanors as follows:

> "§74A-2(1) Upon property owned by or in the possession and control of their respective employers; or
>
> (2) Upon property owned by or in the possession and control of any person or persons who shall have contracted with their employer or employers to provide security for protective services for such property; or
>
> (3) Upon any other premises while in hot pursuit of any person or persons for any offense committed upon property vested in subdivisions (1) and (2) above."

Question: (2) Do such campus police have authority to make investigations of traffic accidents or criminal cases occurring off of the property of the institution, or on private property or on city streets in the vicinity of the campus?

Conclusion: (2) No.

As set forth in Conclusion 1, the authority of the campus police officer is restricted to the territory specified in G. S. 74A-2 as specified above.

Question: (3) May campus police, detectives, or special police of a security patrol agency carry concealed weapons off the premises of the company or institution they are employed to protect?

Conclusion: (3) No.

A private detective has no authority to carry a concealed weapon at any time. Persons who have been commissioned by the Governor pursuant to Chapter 74A, as campus police, or special police for an incorporated security patrol agency, have no authority to carry a concealed weapon when they are off the premises or property which they are employed to protect. Since such special police are police officers, G. S. 74A-2, they would come within the exemption of G. S. 14-269 which permits police officers to carry concealed weapons *when acting in the discharge of their official duties.*

Question: (4) Are railroad police sworn officers acting under the auspices of any State agency, and may they carry concealed weapons off railroad property?

Conclusion: (4) Railroad police are required to take an oath, G. S. 74A-2, and they are appointed by the Governor pursuant to G. S. 74A-1, et. seq. The restriction of the power of arrest to the employors property contained in G. S. 74A-2(b) (1), (2), (3), does not apply to railroad police. See G. S. 74A-2(d). Therefore, they may carry concealed weapons while in the discharge of their official duties.

However, G. S. 74A-6 constitutes railway conductors and station agents as special police with power to make arrest for offenses committed in their presence, or for felonies, or on sworn complaint for misdemeanors. Such authority can only be exercised by the conductors on their respective train or railroad right of way, and by the station agents at their respective station. Thus these persons could not carry concealed weapons off of these specified premises.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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15 March 1971

Subject: Motor Vehicles; Registration of Vehicles Belonging to Tree Farmers at Farmer Rate; G. S. 20-88(b) (2), (3), (4) and (5)

Requested by: Mr. Gonzalie Rivers, Director
License & Theft Division
Department of Motor Vehicles

Question: Under the provisions of G. S. 20-88(b) (2), (3), (4) and (5), are large lumber and paper companies who are engaged in tree farming entitled to license their trucks used to transport logs from the forest to their mills and lumber, bark and wood chips from their mills to place of sale?

Conclusion: Yes, provided the firm or corporation is, in fact, a tree farmer and does not buy timber or forestry products for resale or haul manufactured forestry products for hire.

G. S. 20-88(b) (2) restricts the use of farmer licenses to farmers who do not engage in the business of buying products for resale. Therefore, a tree farmer who owns and operates a saw or lumber mill and also purchases logs or forestry products from others for processing at such mill would not be entitled to farmer licenses. Such milling operation would be a manufacturing establishment and the rough lumber becomes a manufactured product. *Apache County v. S. W. Lumber Mills, Inc.*, 92 Ariz. 323, 376 P. 2d 584 (1962); *Benedict Bros. v. Davidson County*, 110 Tenn. 183, 67 S. W. 806 (1889); and *State ex rel Browne v. A. W. Wilbert's Sons Lumber*

and Shingle Company, 51 La. Ann. 1223, 26 S. 106 (1889).

G. S. 20-88(b) (3) requires that vehicles operating on farmer licenses be operated exclusively in the transportation of licensee's *farm products raised or produced on his farm, farm supplies and not operated in hauling for hire.* Lumber manufactured at the farmer's lumber mill and sold FOB such mill, if hauled by farmer to purchaser, would be a for hire operation.

G. S. 20-88(b) (4), among other things, designates logs, bark, pulp wood, tannic acid wood and other forestry products as farm products which may be transported on farmer licenses, subject to the restrictions created by G. S. 20-88(b) (2) and (3). Therefore, if the tree farmer is purchasing logs from others for processing at his mill, a portion of the by-products derived from the milling operation would not be a farm product raised or produced on tree farmers' farms within the meaning of the statute, and the tree farmer would not be entitled to the farmer rate.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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15 March 1971

Subject: Social Services; Aid to the Aged and Disabled; Migrant Workers.

Requested by: Mr. Robert D. Eason
Director
Carteret County Dept. of Social Services

Question: If a migrant farm worker lives temporarily in a county of North Carolina in a camp for migrants during each of two or three years in succession and, while living once

again in the migrant worker camp becomes ill with cancer, and becomes a patient in a cancer institute, refusing to give information other than the statement that he is from Salem, New Jersey, and making the declaration that he intends to remain in North Carolina, has the migrant worker, based solely on the facts stated, established residence in North Carolina so as to be eligible for aid to the aged or disabled under the provisions of G. S. 108-25?

Conclusion: If a migrant farm worker lives temporarily in a county of North Carolina in a camp for migrants during each of two or three years in succession and, while living once again in the migrant worker camp becomes ill with cancer, and becomes a patient in a cancer institute, refusing to give information other than the statement that he is from Salem, New Jersey, and making the declaration that he intends to remain in North Carolina, the migrant worker has not, based solely on the facts stated, established residence in North Carolina so as to be eligible for aid to the aged or disabled under the provisions of G. S. 108-25.

One of the provisions of G. S. 108-25 is that an applicant for aid to the aged and disabled must be a resident of North Carolina. An excerpt from 70 C.J.S., Paupers, §32, is as follows:

> "The term 'residence' within the meaning of statutes relating to the acquisition of settlements by

residence. . . . means the same thing as 'home', 'abode', or 'place of dwelling', 'residing' in similar statutes means 'having a home' or 'abode', etc."

Entering and remaining in a cancer institute as a patient does not constitute "having a home" within the State in the usual sense of "having a home." This is not to say, of course, that once a person has established a "home" in the usual sense in a state that his period of residence would be interrupted by entering a cancer institute as a patient.

It is stated as a fact in the instant case that the applicant for public assistance had stated that he is "from" Salem, New Jersey. Therefore, until the contrary is made to appear, it appears that the proper conclusion is that Salem, New Jersey, is the place of residence of the applicant. It is suggested that since the applicant is a migrant worker and will give no information except that he is from Salem, New Jersey, the facts in this case are at least as consistent with an intent on the part of the applicant to leave North Carolina when and if able rather than an intent to make North Carolina his home.

"In the absence of a statute on the subject, there is no legal duty to care for a transient or unsettled pauper." 41 Am. Jur., Paupers, § 28, *CF Cerro Gordo County v. Bean County*, 152 Iowa 692, 133 N. W. 132 (1911) at p. 143.

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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15 March 1971

Subject: Public Officers & Employees; Conflict of Interest; Sale of Surplus Property by Municipality; Purchase by Employees.

Requested by: Mr. E. Murray Tate, Jr.
Hickory City Attorney

Question: When a city is selling real estate at public action, does the provision of G. S. 14-234 prohibit all officers and employees of the city other than members of the City Council which is selling the property from bidding and purchasing at the auction sale?

Conclusion: No.

Where the City Council is making the sale of the property, the prohibition of G. S. 14-234 applies only to each member of the City Council who is prohibited under this statute from making any contract from his own benefit under such authority. Thus, ordinary salaried employees of the City may purchase at the public auction as well as any other officers of the City who do not, in their official capacity and duties, have any control over the sale on behalf of the City.

It is assumed in this opinion, that the sale is to be made by the City Council and that the deeds are to be executed by the City Council and that there are no provisions of the City Charter which are pertinent to the inquiry and that G. S. 14-234 is the only statute involved in the inquiry.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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16 March 1971

Subject: Public Officers & Employees; State Employees; Deduction from State Employee's Wages; Wage Earner's Plan; Chapter XIII of Bankruptcy Act.

Requested by: Mr. Henry L. Bridges
State Auditor

Question: May an agency of the State of North Carolina make monthly deductions from the wages of one of its employees in accordance with and upon its receipt of a duly authenticated copy of an order of a referee in bankruptcy directing such deductions and issued, pursuant to a Wage Earner's Plan under Chapter XIII of the Bankruptcy Act, when the employee objects to the deduction ordered?

Conclusion: An agency of the State of North Carolina may make monthly or periodic deductions from the wages of one of its employees in accordance with and upon its receipt of a duly authenticated copy of an order of a referee in bankruptcy directing such deduction and issued pursuant to a Wage Earner's Plan under Chapter XIII of the Bankruptcy Act notwithstanding the employee's objection to the deduction ordered.

Under a Wage Earner's Plan, pursuant to Chapter XIII of the Bankruptcy Act, the petitioning wage earner, who voluntarily has elected to submit a plan, must state in his petition that he is insolvent or unable to pay his debts as they mature and that he desires to effect a composition or an extension, or both, out of his future earnings or wages. Sec. 623, Chp. XIII, Bankruptcy Act. Upon acceptance of the wage earner's proposed plan by the creditors and approval by the court, a portion of the wage earner's wages is directed to be paid into a trustee under the supervision of the bankruptcy court. The trustee in turn prorates the payments to the creditors. The plan usually provides for full payment if such can be accomplished within three years, and if not, the percentage is reduced to the extent that it may be completed in that period of time. *Bankruptcy Guide*, Moore, Reynolds & Sample, Sec. 114 p. 42.

The plan must provide for the submission of the debtor's future earnings or wages to the supervision and control of the court

Sec. 646(4), Ch. XIII, Bankruptcy Act. This requirement is indicative of the basic concept of Chapter XIII relief, in that the settlement is to be made primarily out of the debtor's future earnings. The filing of a Chapter XIII petition by a wage earner carries with it certain consequences. One is that a constructive adjudication in bankruptcy results, with three effects: (1) it gives creditors and all other persons the same rights, duties and liabilities with respect to the debtor's property that they would have after an adjudication in an ordinary bankruptcy proceeding; (2) it gives the officers of the court the same rights, duties and powers, and gives the debtor the same rights, privileges and duties that both possess after an adjudication in ordinary bankruptcy; and (3) it gives the court the same jurisdiction, powers and duties that the court possesses after an ordinary bankruptcy adjudication, which includes exclusive jurisdiction of the debtor and his property, wherever located, and of his earnings and wages during the period of consummation of the plan. Sec. 611 and 612, Ch. XIII, Bankruptcy Act; *North Carolina Law Review*, The Forgotten Remedy: Wage Earner's Plans Under the Bankruptcy Act, Vol. 33, pp. 445-449.

The liabilities and duties of a wage earner and the jurisdiction, powers and duties of the bankruptcy court pursuant to Chapter XIII of the Bankruptcy Act, as well as the position of an agency of the State of North Carolina employing a wage earner subject to such liabilities, duties and jurisdiction, should be considered in light of the provisions of G. S. 147-62. This statute provides:

> "§ 147-62. *Assignments of claims against State.*—All transfers and assignments made of any claim upon the State of North Carolina or any of its departments, bureaus or commissions or upon any State institution or of any part or share thereof or interest therein, whether absolute or conditional and whatever may be the consideration therefor and all powers of attorney, orders or other authorities for receiving payment of such claim or any part or share thereof shall be absolutely null and void unless such claim has been duly audited and allowed and the amount due thereon fixed and a warrant for the payment thereof has been issued; and no warrant shall be issued to any assignee of any claim or any part or share thereof or interest

therein: Provided that this section shall not apply to assignments made in favor of hospitals, building and loan associations, and life insurance companies: Provided further, that any employee of the State or any of its institutions, departments, bureaus, agencies or commissions, who is a member of any credit union organized pursuant to Chapter 54 of the North Carolina General Statutes having a membership at least one half of whom are employed by the State or its institutions, departments, bureaus, agencies or commissions, may authorize, in writing, the periodic deduction from his salary or wages as such employee of a designated lump sum, which shall be paid to such credit unions when said salaries or wages are payable, for deposit to such accounts, purchase of such shares or payment of such obligations as the employee and the credit union may agree: Provided, further that this section shall not apply to assignments made by members of the State Highway Patrol, agents of the State Bureau of Investigation, motor vehicle inspectors of the Revenue Department, and State prison guards to the commissioners of the Law Enforcement Officers' Benefit and Retirement Fund in payment of dues due by such persons to such Fund."

While G. S. 147-62 does not express an attempt to legislate in the field of bankruptcies or deal with the debtor-creditor relationship as such, this statute does seem to prohibit or declare void all assignments of any claim upon the State or any of its agencies which is not expressly provided for as an exception in the statute, and if this statute is applied or given effect so as to prohibit an employee of a State agency from submitting a wage earner's plan or petition under Chapter XIII of the Bankruptcy Act, or to prohibit a State agency from recognizing the validity or authority of a bankruptcy court order issued pursuant to such Plan and Chapter, the obvious effect of such statute is a contravention or circumvention of the Bankruptcy Act. In this regard, it has been held that state legislation interfering with the power of Congress to determine whether one may be bankrupt and what relief may be granted to him and to his creditors must give way before the paramount authority of Congress to legislate on the subject of bankruptcies

9 Am. Jur. 2d., Bankruptcy, Sec. 11, p. 54. *Re Wisconsin Co-op Milk Pool*, 119 F. 2d 999, cert. denied 314 U. S. 655, 86 L. ed. 525. In light of this principle, G. S. 147-62 should not be construed as indicative of legislative intent to prohibit an assignment or transfer of a claim for wages by a State employee pursuant to Chapter XIII of the Bankruptcy Act.

While the submission of a plan under Chapter XIII of the Bankruptcy Act is voluntary on the part of the wage earner, it must be done, and must be held to have been submitted by the wage earner, with full cognizance of the provisions of Section 646(5), 657 and 658 of Chapter XIII of the Act. These sections provide as follows:

> "Sec. 646. A plan under this chapter — (5) shall provide that the court may from time to time during the period of extension increase or reduce the amount of any of the installment payments provided by the plan, or extend or shorten the time for any such payments, where it shall be made to appear, after hearing upon such notice as the court may designate, that the circumstances of the debtor so warrant or require."
>
> "Sec. 657. Upon confirmation of a plan, the plan and its provisions shall be binding upon the debtor and upon all creditors of the debtor, . . .
>
> Sec. 658. During the period of extension, the court — (1) shall retain jurisdiction of the debtor and his property for all purposes of the plan and its consummation and shall have supervision and control of any agreement or assignment, provided for in the plan, in respect to any future earnings or wages of the debtor; and (2) may issue such orders as may be requisite to effectuate the provisions of the plan, including orders directed to any employer of the debtor. An order directed to such employer may be enforced in the manner provided for the enforcement of judgments."

Therefore, an agency of the State of North Carolina, notwithstanding objection by one of its employees, should comply with an order from a bankruptcy court directing periodic deductions from the wages of such employee, upon such agency's receipt of the original or a duly authenticated copy of such order. If a signed original or duplicate orginal order is not or cannot be made available to the agency, it would be reasonable for the agency to require a certified true copy over the seal and signature of the clerk of the federal district court having jurisdiction.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General

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19 March 1971

Subject: Business & Commerce; Building Code; Gasoline Pumps; Sale of Gasoline from Unattended Gasoline Pumps; G. S. 143-138.

Requested by: Mr. Thomas B. Griffin
Lenoir County Attorney

Question: Are the State Building Code and the regulations of the State Building Code Council applicable to installations where unattended self-service dispensing devices are used to dispense gasoline?

Conclusion: No. The contents of the State Building Code, as set out in G. S. 143-138(b) are restricted to "buildings". As commonly constructed, unattended self-service gasoline dispensing devices are not "buildings". Therefore the General Statutes do not authorize the State Building Code Council to regulate unattended self-service

gasoline dispensing devices.

The General Assembly created the Building Code Council and authorized the Council to ". . . prepare and adopt, *in accordance with the provisions of this article*, a North Carolina State Building Code." (*Emphasis added.*) G. S. 143-138(a).

The General Assembly prescribed the contents of the Code, in part, as follows:

> "(b) Contents of the Code.—The North Carolina State Building Code, as adopted by the Building Code Council, may include reasonable and suitable classifications of buildings, both as to use and occupancy; general building restrictions as to location, height, and floor areas; rules for the lighting and ventilation of buildings; requirements concerning means of egress from buildings; requirements concerning means of ingress in buildings; regulations governing construction and precautions to be taken during construction; regulations as to permissible materials, loads, and stresses; regulations of chimneys, heating appliances, elevators, and other facilities connected with the buildings; regulations governing plumbing, heating, air-conditioning for the purpose of comfort cooling by the lowering of temperature, and electrical systems; and such other reasonable rules and regulations pertaining to the construction of buildings and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building, its neighbors, and members of the public at large."

It is obvious from reading G. S. 143-138(b) that the General Assembly intended the Building Code to relate to buildings *occupied* by man.

The General Assembly did not define "building".

The Building Code Council has defined the term "building" as follows:

"*BUILDING*—means any structure built for the support, shelter or enclosure of persons, animals, chattels, or property of any kind which has enclosing walls for 50% of its perimeter. The term 'building' shall be construed as if followed by the words 'or part thereof'. (For the purpose of this Code each portion of a building separated from other portions by a fire wall shall be considered as a separate building)." N. C. Building Code, sec. 201 (Vol. I, 1967, ed.)

Black's Law Dictionary, 3d ed., defines "building", in part, as follows:

". . . a structure or edifice inclosing a space within its walls and usually, but not necessarily, covered with a roof.

"The term generally, though not always, implies the idea of a habitation for the permanent use of man, or an erection connected with his permanent use. . . ."

Typically, unattended self-service gasoline dispensing devices are made up of two pumps, located on a concrete "island", and surrounded by enough open space for an automobile, or several automobiles to park while they are being refueled from the pumps. These "islands" have no walls. They usually have no roof. They clearly are not "buildings" within the Building Code Council's own definition or that of a legal dictionary.

This opinion does not relate to any self-service gasoline dispensing device which is a part of a typical service station facility consisting of a building with adjacent "islands" or "islands" physically connected by a roof with the service station building.

Robert Morgan, Attorney General
Millard R. Rich, Jr.,
Assistant Attorney General

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24 March 1971

Subject: ABC Act; Beer and Wine; Authority of County ABC Board and Board of County Commissioners to Regulate or Prohibit the Sale of Wine; G. S. 18-116.2; G. S. 18-119, et seq.; G. S. 18-139.

Requested by: Mr. Robert R. Blackwell
Attorney for Caswell County
ABC Board

Question: Does a county ABC board, in those counties listed in G. S. 18-119 have the authority to limit the sale of wine to ABC stores exclusively when the county board of commissioners have adopted a regulation to issue wine licenses in the county?

Conclusion: No.

By Chapter 1076, Session Laws of 1945 (Article 10, Chapter 18 of the General Statutes), several counties were granted full power and authority to regulate or prohibit the sale of wine within the counties.

In 1949, Chapter 1251 of the Session Laws amended Article 8 of Chapter 18 of the General Statutes to provide better regulation and enforcement of the wine sales by giving the State and local ABC boards additional authority over the sale of wine. G. S. 18-116.2 provided that local ABC boards shall have, at all times, the discretionary right to limit the sale of wine to ABC stores exclusively.

Chapter 974, Session Laws of 1949, amended Chapter 18 to place the control of the sale and distribution of malt beverages under the State Board of Alcoholic Control. In 1963, Chapter 426 was enacted and the principal change was to make Article 12 and certain other sections of Chapter 18 applicable to wine as well as malt beverages. G. S. 18-139, as therein rewritten, states that it shall not repeal any act authorizing the board of commissioners of any county

or the governing body of any municipality, in its discretion, to prohibit the sale of beer or wine.

Although the authority conferred upon county commissioners in G. S. 18-119 and G. S. 18-121, and the authority of county ABC boards to limit the sale of wine to ABC stores appears to be conflicting powers granted to two different boards, it is our opinion that in construing the various statutes together, the legislative intent was not to repeal the authority of the county commissioners in those counties listed in G. S. 18-119. Thus local ABC boards in those counties, have no power to limit the sale of wine exclusively to ABC stores when the commissioners have exercised the authority granted in Article 10 of Chapter 18 of the General Statutes.

Of course, the local ABC board is not prohibited by statute from selling wine, including champagne at the ABC store if it so desires.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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24 March 1971

Subject: Motor Vehicles; Rules of the Road; Arrest Without Warrant; Evidence - Motion to Suppress

Requested by: Solicitor John W. Twisdale
11th Judicial District

Question: When defendant is arrested without a warrant at the scene of an accident for operating a motor vehicle while under the influence of intoxicating beverage, the offense not being committed in the arresting officer's presence, are statements made by the defendant and results of chemical test for alcohol subject to motion

to suppress?

Conclusion: An illegal arrest does not ipso facto render statements made by a defendant or the results of a chemical analysis for blood alcohol subject to a motion to suppress.

G. S. 15-41, entitled "When officer may arrest without warrant", in part, provides:

> "A peace officer may without warrant arrest a person:
>
> (1) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence;"

An arrest without warrant except as authorized by statute is illegal, *State v. Mobley*, 240 N. C. 476, and such arrest should not be made. However, as stated by Justice Branch in *State v. Moore*, 275 N. C. 141, quoting from *Culombe v. Connecticut*, 367 U. S. 568:

> "'No single litmus-paper test for constitutionally impermissible interrogation has been evolved. . . .'"

In *State v. Moore*, at 153, Justice Branch further stated:

> "We condemn any illegal act by police officers. However, when viewed in the narrow field of voluntary confession, we fail to see why an illegal arrest--unaccompanied by violent or oppressive circumstances--would be more coercive than a legal arrest.
>
> (4) Both reason and weight of authority lead us to hold that every statement made by a person in custody as a result of an illegal arrest is not ipso facto involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in

determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility.

(5, 6) In this jurisdiction, when a purported confession of a defendant is offered into evidence and defendant objects, the trial judge, in the absence of the jury, hears evidence of both the State and the defendant upon the question of the voluntariness of defendant's statements. *State v. Gray*, 268 N. C. 69, 150 S. E. 2d 1, cert. den. 386 U. S. 911; *State v. Rogers*, 233 N. C. 390, 64 S. E. 2d 572. The general rule is that after such inquiry, when there is conflicting evidence offered at the voir dire hearing, the trial judge shall make findings of fact to show the bases of his ruling on the admissiblity of the evidence offered. *State v. Bishop*, 272 N. C. 283, 158 S. E. 2d 511; *State v. Conyers*, 267 N. C. 618, 148 S. E. 2d 569."

In *State v. Hill*, 9 N. C. App. 279, the defendant was arrested at the scene of an accident without warrant for operating a motor vehicle while under the influence of intoxicating beverage, the offense not having been committed in the officer's presence. Chief Judge Mallard speaks for the court on the question of admissibility of the breathalyzer test taken by the defendant:

"(7) The defendant was arrested without a warrant for the misdemeanor of operating an automobile on a public highway while under the influence of intoxicating liquor. The evidence reveals that the offense was not committed in the presence of the arresting officer. The statute does not permit a police officer to arrest a person for a misdemeanor without a warrant unless it is committed in his presence or unless the officer has reasonable grounds to believe that it was committed in his presence. G. S. 15-41. We are not here concerned with whether the defendant could have or should have been arrested for public drunkenness. The record is silent on the subject. Neither are we here concerned with whether a police

officer who arrives at the scene of an automobile collision should be permitted to arrest, without a warrant, a person who is under the influence of intoxicating liquor and who informs the officer that he was the operator of one of the vehicles involved—that is a matter for the Legislature to determine. Also, we are not here concerned with what remedy the defendant has, if any, against those who violated his rights.

Defendant argues and contends that the court committed error in admitting the results of the breathalyzer test and the sound motion pictures taken of him after his illegal arrest and before the warrant was served on him.

(8) The applicable statute provides that a person who operates a motor vehicle on the highways in North Carolina is deemed to have given consent to a chemical test of his breath for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of intoxicating liquor. G. S. 20-16.2(a). The breathalyzer test is a chemical test for the testing of a person's breath for the purpose of determining the alcoholic content of his blood. There is no contention made that the test itself was improperly administered. The defendant testified on voir dire that he was advised of his rights by the officer at the scene of the accident and that he did not refuse to take the breathalyzer test. The trial judge on the voir dire made no findings that the arrest of the defendant or the giving of the breathalyzer test and taking of the pictures was accompanied by violent or oppressive circumstances; neither does the evidence indicate that it was. *State v. Moore*, 275 N. C. 141, 166 S. E. 2d 53 (1969). On the contrary, the trial judge found that the defendant 'voluntarily submitted to the State's Breathalyzer test.' The results of the breathalyzer test

> made in compliance with G. S. 20-139.1 are properly admitted in evidence upon a showing that the defendant voluntarily submitted to the test. 2 Strong, N. C. Index 2d, Criminal Law, § 64."

On certiorari to review the decision of the Court of Appeals in *State v. Hill*, Justice Sharp, speaking for the majority of the court, said:

> "The Attorney General concedes that defendant's arrest was illegal. However, citing *State v. Moore*, 275 N. C. 141, 166 S. E. 2d 53, he contends that the illegal arrest did not ipso facto render the questioned evidence incompetent, since there were no oppressive circumstances surrounding the arrest. He argues that defendant voluntarily consented to the breathalyzer test and did not object to being photographed, and–since the sound motion picture was not made a part of the case on appeal--that the exception to its admission in evidence is not presented. These contentions are not without merit. However, because we base our decision upon the denial of defendant's motion to dismiss, we will not discuss further the motion to suppress evidence." *State v. Hill*, 277 N. C. 547.

The holding in *State v. Hill*, 9 N. C. App. 279, 275 N. C. 547, does not overrule the holding in *State v. Moore, supra*. Though an arrest is illegal under the circumstances presented by the question hereinabove set out, the test of admissibility of statements made by the defendant or submission to chemical test for blood alcohol is based on voluntariness of defendant's action. The voluntariness of defendant's action must be determined by the trial judge on voir dire examination and the trial judge must make findings of fact to show the basis of his ruling on the admissibility of the evidence offered.

It is worthy of note that a law enforcement officer who makes an arrest without a warrant for misdemeanor not committed in his presence does so at his own peril.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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24 March 1971

Subject: Prisons & Prisoners; Sentences; Responsibility of the North Carolina Department of Correction Regarding Commitments for a Term in Excess of that Provided for by Statute.

Requested by: Mr. Martin R. Peterson
North Carolina Dept. of Correction

Question: What is the responsibility of the North Carolina Department of Correction upon receipt of an inmate sentenced to a term that exceeds the maximum provided for by statute?

Conclusion: The North Carolina Department of Correction is obliged to receive and keep in custody until discharged by law all convicts sentenced to imprisonment by the courts of this State.

G. S. 148-6 provides, inter alia, that

"The State Department of Correction shall provide for receiving, and keeping in custody until discharged by law, all such convicts as may be now confined in the prison and such as may be hereinafter sentenced to imprisonment therein by the several courts of this State. . . ."

The mandate of the Department of Correction is clearly set forth

in G. S. 148-6. As a function of the executive department of the government of the State of North Carolina, the Department of Correction cannot overreach into the judiciary and determine the validity of commitments which appear regular on their face. This is solely within the scope of the judiciary which is empowered to review such alleged defects in proceedings brought under the Habeas Corpus or Post Conviction Hearing Acts. Therefore, the Department of Correction must accept any such inmate whose sentence is in excess of that provided for by law, until discharged through appropriate proceedings brought in the courts of this State.

However, although the Department of Correction is obligated by law to receive and keep inmates even though the sentence imposed is in excess of that provided for by statute, this does not relieve the Department and its officials of the obligation, imposed, not by law, but by a sense of what is just and fair, to bring such patent defects to the attention of the inmate so he may petition the courts through the appropriate statutory procedures to reduce the sentence to within the maximum provided for by law.

Robert Morgan, Attorney General
Jacob L. Safron,
Assistant Attorney General

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24 March 1971

Subject: Prisons & Prisoners; Sentences; Department of Correction; Commitment; Time Sentence Begins

Requested by: Mr. Martin R. Peterson
North Carolina Dept. of Correction

Questions: (1) When should a prisoner's sentence begin when custody over him is not obtained until after judgment and commitment in North Carolina due to his incarceration by

another jurisdiction?

(2) Should the commitment issued upon conviction be sent back to the superior court in order that another commitment might be issued with a commitment date reflecting when North Carolina actually received custody of the prisoner?

Conclusions:

(1) A prisoner's sentence begins when custody over him is obtained by North Carolina after release by another jurisdiction, not when the North Carolina judgment and commitment are dated, when the prisoner is returned to the foreign jurisdiction by North Carolina after conviction in order that he might complete service of the sentence imposed in the other jurisdiction before serving the North Carolina sentence.

(2) It is not necessary that the commitment issued in North Carolina be sent back to the superior court in order that another commitment might be issued with a commitment date reflecting when North Carolina actually received custody of the prisoner.

The basic rule is that "once service of a sentence has commenced, it is not subject to interruption *as long as the prisoner is in physical custody*." *Perkins v. Peyton*, 369 F. 2d 590, 592 (1966). Likewise, a sentence does not commence until the prisoner is in physical custody. Quite obviously, the prisoner is not under North Carolina's custody while in the Maryland House of Correction.

"(A) sentence begins when a prisoner is received in

the institution to which he has been sentenced. . . . a sentence does not begin until commitment of the prisoner to the institution wherein the sentence will be served." *Maine v. Couture*, 163 A. 2d 646, 654 (1960). "A state prison sentence does not begin to run until a prisoner is physically delivered to the warden of the state prison." *Janosko v. Kross*, 207 N.Y.S. 2d 197, 199 (1960).

As a general rule, when a defendant is sentenced by a court while serving a sentence imposed by another jurisdiction at the time of pronouncement, the subsequent sentence does not commence until the prisoner is received into their custody for service of such sentence. See *Todd v. Wilson*, 310 F. Supp. 1025 (1970); *Haney v. Wingo*, 453 S. W. 2d 556 (Ky. 1970); *Powers v. Taylor*, 327 F. 2d 498 (1964); *Amirr v. U. S., 301 F. 2d 662 (1962); Green v. U. S.*, 334 F. 2d 733 (1964).

This would be analogous to holdings that an escaped prisoner is not entitled to credit for time served in a sister state for violation of the sister state's law. See *Plymale v. Coiner*, 302 F. Supp. 1272 (1969). In neither case is the prisoner in the "physical custody" of the jurisdiction wherein the sentence was imposed.

Therefore, the prisoner's sentence should start on the date he entered our system. The date of his commitment would not be controlling. As stated by the Court of Appeals of Alabama:

> "The date on which the circuit court passes sentence has no bearing on how long a man will stay in the penitentiary. The date on which he begins to obey and endure the execution of the sentence is the commencement of computation." *Ex Parte Cofield*, 164 So. 2d 716, 717 (Ala., 1964).

Therefore, it would not be necessary to have the commitment sent back and another issued with a commitment date reflecting when we actually received the prisoner from Maryland.

Robert Morgan, Attorney General
Edward L. Eatman, Jr.
Staff Attorney

26 March 1971

Subject: Criminal Law & Procedure; Arrest and Bail; Right to Communicate

Requested by: Officer R. T. Price
Benson Police Department

Questions: (1) Is there any law governing the length of time that a man locked up for public drunkenness or driving under the influence of intoxicants must stay in jail if taken before a magistrate and bond set?

(2) Should a person charged with public drunkenness or driving under the influence be allowed to make a phone call just as soon as he is arrested or is he required to be sober in order to make his phone call?

Conclusions: (1) There is no statutory law establishing the period of time a person incarcerated for public drunkenness or driving under the influence must be held.

(2) A person arrested for public drunkenness or driving under the influence must be allowed to communicate immediately.

In regard to Conclusion 1, G. S. 15-47 provides:

> "§ 15-47. *Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends.* -- Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this State, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital

cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied. Provided that in no event shall the prisoner be kept in custody for a longer period than twelve hours without a warrant.

"Any officer who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court."

In *State v. Reel*, 254 N. C. 778, where the defendant was arrested for driving under the influence of intoxicating beverage, the Court said:

"Defendant was arrested about 7:00 P. M. A warrant was issued on the night of his arrest. He was released under bond the next day. The hour of release does not appear. G. S. 15-47 provides 'that in no event shall the prisoner be kept in custody for a longer period than twelve hours without a warrant.' There is no showing that this provision was violated. No physician testifed for defendant at the trial. It is a reasonable inference that he was not examined by a doctor upon his release from custody. If he was ill, he apparently recovered during the night. It is a reasonable assumption that his nausea was caused by the beer. It is better practice to call a doctor when requested by a person in custody, but the failure to do so under the circumstances here presented does not amount to a substantial denial of a constitutional right.

"We do not hold that the failure to fix bail and release one who appears to be in a drunken condition, under the factual situation in this case, constitutes a violation of the Constitution, State or Federal, when he is not detained for an unreasonable period. Defendant's

> detention seems to have been the best course for his security and that of the public."

If a person arrested for public drunkenness or driving under the influence of intoxicants can make the required bond and is capable of taking care of himself, he should be immediately released or, if bond is made and a responsible person agrees to take the person arrested to some other lawful place, he should be released to such responsible person. If, however, the person so arrested makes cash bond but is intoxicated to the point of being incapable of taking care of himself, he should not be released until he is capable of doing so. Further, as there is no legal foundation for the so-called "four hour rule", right to release should be based on sobriety and not a set period of time. Unreasonable detention may well become illegal detention. *State v. Reel, supra.*

In regard to Conclusion 2, in *State v. Hill*, 277 N. C. 547 (1971), Justice Sharp, speaking for the court, said:

> "When one is taken into police custody for an offense of which intoxication is an essential element, time is of the essence. Intoxication does not last. Ordinarily a drunken man will 'sleep it off' in a few hours. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. The statute says he is entitled to communicate with them *immediately*, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon.
>
> "Defendant's guilt or innocence depends upon whether he was intoxicated at the time of his arrest. His condition then was the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner's call are not permitted to see for themselves whether he is intoxicated. In this factual situation, the right of a defendant to communicate with counsel and friends implies, at the very least, the right to have them see him, observe

and examine him, with reference to his alleged intoxication. . . ."

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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29 March 1971

Subject: Licenses & Licensing; Plumbing and Heating Contractors; Qualification and Licensing Under the Grandfather Clause.

Requested by: Mr. F. O. Bates
Executive Secretary
State Board of Examiners of Plumbing and Heating Contractors

Question: May the Board of Plumbing and Heating Contractors grant a license under the grandfather clause to an individual whose principal place of business is in a city or town whose population is over 3,500 but who has "engaged in business" in cities or towns under 3,500 which have attained a population of over 3,500 as recorded by the 1970 Federal Census?

Conclusion: The Board of Plumbing and Heating Contractors may issue a license in the class in which he is qualified without an examination to any person, who is engaged in the business as defined by the Act and who has paid the required revenue tax.

G. S. 87-21(d) provides as follows:

"*License Granted without Examination*. -- Persons who

> were *engaged in business as defined in this article*, in cities or towns which attained a population of more than 3,500, as recorded by the last decennial United States census, and who had paid the required State revenue tax within the census year in which the municipality attained a population of more than 3,500, shall be granted a certificate of license in the classification in which they are qualified, without examination, upon documented proof as required by the Board, within 12 months after publication of the last official United States census, and payment of the annual license fee." *(Emphasis added.)*

G. S. 87-21(a)(5) defined the term "engaged in business" as follows:

> "Any person, firm or corporation, who for a valuable consideration, installs, alters, or restores, or offers to install, alter or restore, either plumbing, heating group number one, or heating group number two, or heating group number three, or any combination thereof, as defined in this article, shall be deemed and held to be engaged in the business of plumbing or heating contracting."

The Board of Examiners of the Plumbing and Heating Contractors will have to determine if the applicant was "engaged in business" according to the definition of the term as set out above. Upon the Board's determination that the applicant has been engaged in the plumbing and heating business as defined in this article, and that all revenue taxes have been paid within the census year in which the municipality obtained a population of more than 3,500, it is required to grant a certificate of license in the classification in which he is qualified without examination.

It should be noted that the 1967 General Assembly changed the basis of licensing from "*persons who have an established place of business in cities or towns* which attain a population of more than 3,500 as indicated by the last official United States census," to "*persons engaged in the business as defined by this statute*", leaving this statute to apply to those who had "engaged in the business

of plumbing and heating" thus removing the limitation of the application of the grandfather clause "to those persons who had an established place of business in cities or towns which attained a population of more than 3,500."

Robert Morgan, Attorney General
James E. Magner,
Trial Attorney

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29 March 1971

Subject: Courts; Jurisdiction; Amount in Controversy; Including Amount Counterclaimed for Purposes of Determining Jurisdiction

Requested by: Honorable Abner Alexander
Chief Judge
Twenty-first Judicial District

Question: When a counterclaim is asserted, how is jurisdiction of magistrates, district courts and superior courts determined?

Conclusion: The amount in controversy is determined by considering all claims, counterclaims and cross-claims. When the amount is $300 or less, the claim may be assigned to a magistrate. When the amount is $301 to $5,000, the matter should be heard by a district court judge, unless the counterclaim can be served as provided in G. S. 7A-219 to keep it within magistrate jurisdiction. For amounts in excess of $5,000, the superior court has jurisdiction.

G. S. 7A-219 provides as follows:

"§ 7A-219. *Certain counterclaims; cross-claims; third party claims not permissible.* -- No counterclaim, cross-claim or third party claim which would make the amount in controversy exceed three hundred dollars ($300.00) is permissible in a small claim action assigned to a magistrate. No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claim action."

G. S. 7A-219 is contained in Article 19 of Chapter 7A which, in G. S. 7A-210, defines small claims actions for the purpose of determining whether the action could be assigned to a magistrate or heard by a district court judge. The sense of these sections is that any claim and a counterclaim or cross-claim in the action which aggregates $300 or less may be assigned to the magistrates. Although aggregation is used in the statute in the sense of addition, it is used here in the sense of set-offs being substituted. Anything over that amount, but still within the jurisdiction of district courts, must be heard by a district court judge.

G. S. 7A-243 is the statute which defines amount in controversy for purposes of determining whether the action shall lie in district court or superior court. As to which claims are added or used as set-off, see the provisions of this statute which indicate, among other things, that interest and costs are not considered, and which indicate claims which are aggregated. Of course, the jurisdictional amount in that section is $5,000 so that if counterclaims, cross-claims, claims which are joined, used as set-off, etc., as defined in *that section*, aggregate $5,000, or less, then the district court is the proper jurisdiction but such cases may be assigned to a magistrate only if the aggregate amount is $300 or less. (It would appear from the provisions of G. S. 7A-219 quoted above that a counterclaim which would increase the amount over the jurisdiction of the magistrate simply is impermissible and should be severed if it would operate to make the amount in controversy over $300.) Any amount over $5,000, of course, could be assigned to the superior court.

Robert Morgan, Attorney General
(Mrs.) Christine Y. Denson,
Assistant Attorney General

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31 March 1971

Subject: Education; Property; Authority of City Board of Education to Lease School Building and Adjoining Property to Private Nonprofit Corporation.

Requested by: Mr. Marshall T. Spears
Attorney for the Durham City
Board of Education

Question: May the Durham City Board of Education, a city administrative unit, lease to a private nonprofit corporation a school building and approximately 2.77 acres of land on which the said school building is located?

Conclusion: If the Durham City Board of Education is of the opinion that the public school building and adjoining property held by it is unnecessary or undesirable for public school purposes, but the sale of such property is not practicable or in the public interest, the Durham City Board of Education in its discretion may lease such property to a nonprofit corporation for a term not in excess of one year.

The letter of inquiry represents that the school building in question and the land on which it is located is not presently being used for public school purposes by the Durham City Board of Education. A private nonprofit corporation desires to lease the building and adjoining lands for the purpose of operating therein and thereon a facility called "Early Child Day-Care and Early Childhood Development."

Subsection (e) of G. S. 115-126 provides as follows:

> "(e) When in the opinion of any county board of education, or of the board of education for any city administrative unit, the use of any property owned or held by it is unnecessary or undesirable for public school purposes, but the sale of such property is not practicable or in the public interest, such board may in its discretion enter into an agreement with any other person, firm or corporation for the lease of such property to such person, firm or corporation for a term not in excess of one year, upon such terms and conditions as the board shall deem advisable and in the public interest."

If the Durham City Board of Education is of the opinion that the property referred to above is now unnecessary or undesirable for public school purposes but that the sale of such property is not practicable or in the public interest, then the Durham City Board of Education may in its discretion lease said property to the nonprofit corporation for a term not to exceed one year. It is suggested that the Durham City Board of Education make such findings as will comply with this subsection of the statute and pass the same in the form of a resolution; then it may enter into a lease agreement for the property to be used by the nonprofit corporation for a period not to exceed one year.

Robert Morgan, Attorney General
Ralph Moody,
Deputy Attorney General

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31 March 1971

Subject: Housing Authorities; Commissioner of Labor; Boiler Inspection Fees; Exemption of Housing Authority.

Requested by: Honorable Frank Crane
Commissioner, Dept. of Labor

Question: Is a housing authority exempt from the payment of boiler inspection fees to State boiler inspectors?

Conclusion: A housing authority is exempt from the payment of boiler inspection fees to State boiler inspectors.

Article 7 of Chapter 95 of the General Statutes provides for the compulsory inspection of certain boilers by State inspectors and sets up a fee schedule for such inspection in G. S. 95-68 and G. S. 95-68.1.

G. S. 156-26, relating to housing authorities, provides in part as follows:

> "The authority shall be exempt from the payment of any taxes *or fees* to the State or *any subdivision thereof*, or to any officer or employee of the State or any subdivision thereof." (*Emphasis added.*)

The language of the housing authority exemption is quite specific. It is a rule of statutory construction that the specific controls over the general and, therefore, the specific exemption of payment of boiler fees would control. Consequently, a housing authority would not be subject to the general law requiring payment of boiler inspection fees. It would still be essential to comply with the boiler inspection laws in all other respects.

Robert Morgan, Attorney General
Harry W. McGalliard,
Chief Deputy Attorney General

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8 April 1971

Subject: Social Services; Nursing Homes; Direct Payments to Nursing Homes; Payment in Advance for Nursing Home Services.

Requested by: Mr. Clifton M. Craig
Commissioner
North Carolina Department
of Social Services

Question: May medical assistance payments to nursing homes provided for by Part 5 of Article 1 of Chapter 108 of the General Statutes and by G. S. 108-27 entitled "Direct Payments for Nursing and Custodial Care" be made in advance of the rendering of the services for which such payments are made?

Conclusion: Medical assistance payments to nursing homes provided for by Part 5 of Article 1 of Chapter 108 of the General Statutes and by G. S. 108-27 entitled "Direct Payments for Nursing and Custodial Care" may not be made in advance of the rendering of the services for which such payments are made.

It was concluded in 41 N.C.A.G. 151, a copy of which is attached, based upon unequivocal statutory requirements, that "It is not lawful for more than 50 percent of the non-administrative program costs for the medical assistance program. . . to be paid by the State instead of 50 percent by the State and 50 percent by the counties." It was concluded in 40 N.C.A.G. 701, a copy of which is attached, that counties may not make advance payments to nursing homes for services to be rendered under the medical assistance program. It does not appear that there is any authority for the State Board of Social Services to pay out the money of a county or to make a commitment for such payment, in advance of the rendering of the services for which payment is made. Hence, the conclusion stated above.

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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8 April 1971

Subject: Taxation; Gasoline Tax; Refunds of Taxes Paid by Counties and Municipalities; Tax Paid on Motor Fuel Used by County-Owned Hospital; G. S. 105-446.1

Requested by: Mr. Leon M. Killian, III
Attorney for Board of Trustees
of Haywood County Hospital

Question: Is a county-owned and operated hospital entitled under G. S. 105-446.1 to make direct application for and to receive directly refunds of gasoline taxes paid by it on motor fuels used by its vehicles?

Conclusion: A county-owned and operated hospital is not entitled under G. S. 105-446.1 to make direct application for and to receive directly refunds of gasoline taxes paid by it on motor fuels used by its vehicles, although such hospital, as an integral part of the county operation and body politic of the county, is entitled to such refund if its request therefor is consolidated with and submitted as a part of the county's application for refund and such refund is received through the county.

G. S. 105-446.1 provides that "counties and municipal corporations" shall be entitled to be reimbursed at the rate of eight cents per gallon of the motor fuel tax levied by G. S. 105-434 "upon the filing of a statement with the Commissioner of Revenue" showing the number of gallons of fuel purchased and used, which statement with respect to the county must be sworn to by "the chairman of the board of county commissioners, or other county officer designated by the board of county commissioners." A hospital owned and operated by a county through a board of trustees is an integral part of the county governmental operation and body politic, and as such, like any other county department, should be

entitled to receive by way of refund that portion of the total county application for refund under G. S. 105-446.1 which represents the refundable portion of the motor fuel tax paid by such hospital in its operation as a part of the county.

To the extent opinion memorandum heretofore issued by this office dated 18 May 1966, regarding refunds to a county-owned hospital, is inconsistent with this opinion, such previous opinion is withdrawn.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General

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8 April 1971

Subject: State Departments, Institutions and Agencies; State Highway Commission; Powell Bill Funds

Requested by: Mr. William F. Caddell, Jr.
Planning & Research Engineer
State Highway Commission

Question: What are the eligibility requirements for a municipality incorporated prior to January 1, 1945, to receive Powell Bill funds appropriated from the State Highway Fund pursuant to the provisions of G. S. 136-41.1?

Conclusion: The eligibility requirements for a municipality incorporated prior to January 1, 1945, to receive Powell Bill funds are that it must have "*within the four-year period next preceding the annual allocation of funds conducted an election for the purpose of electing municipal officials and currently imposes an ad*

valorem tax or provides other funds for the general operating expenses of the municipality."

G. S. 136-41.1 provides for the appropriation and allocation from the State Highway Fund to municipalities of a portion of the gasoline taxes collected. G. S. 136-41.2 contains the conditions of eligibility for receipt of Powell Bill funds by municipalities incorporated after January 1, 1945. Prior to 1963, the present G. S. 136-41.1 was designated as G. S. 136-41.2 and the first sentence of the third paragraph provided as follows: "No municipality shall be eligible to receive funds under . . . G. S. 136-41.2 unless it has within the four-year period next preceding the annual allocation of funds conducted an election for the purpose of electing municipal officials and currently imposes an ad valorem tax or provides other funds for the general operating expenses of the municipality."

Chapter 854 of the 1963 Session Laws repealed the foregoing requirements for eligibility from the provision of G. S. 136-41.2 and redesignated G. S. 136-41.2 as G. S. 136-41.1 and added the present requirements for eligibility for Powell Bill funds as set out in G. S. 136-41.2. Section 3 1/2 of Chapter 854 of the 1963 Session Laws provides that "the provisions of this Act shall not apply to any municipality incorporated prior to January 1, 1945." The effect of Section 3 1/2 of the Act is to make the eligibility requirements contained in the present G. S. 136-41.2 applicable to the municipalities incorporated after January 1, 1945, and to make the foregoing provision relating to eligibility that was contained in the first sentence of the third paragraph of G. S. 136-41.2 prior to redesignation, and the amendment made by the 1963 Session Laws, applicable to those municipalities incorporated prior to January 1, 1945.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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8 April 1971

Subject: Criminal Law & Procedure; Larceny; Dogs Not Listed for Taxes; G. S. 14-84; G. S. 67-15; G. S. 67-27

Requested by: Mr. Carl Arvey
Chief, Bryson City Police Dept.

Question: May a dog, not listed for taxes, be a subject of larceny?

Conclusion: Under G. S. 14-84, a dog, whether listed for taxes or not, may be a subject of larceny.

Inquiry has been made as to whether a person can properly be charged with larceny for stealing a dog not listed for taxes. At common law, property interests in dogs were recognized and protected (*Mowery v. Salisbury*, 82 N. C. 176 (1879)), yet they could not be the subject of larceny. Only by statute could stealing a dog be made larceny. *State v. Holder*, 81 N. C. 527 (1879).

However, there are now three statutes which deal specifically with the subject. Prior to 1955, G. S. 14-84 provided that "the larceny of any dog upon which the license tax provided in article two of the chapter entitled Dogs has been paid shall be a misdemeanor." Thus, under the statute, a dog upon which the tax had been paid could be the subject of larceny, and implicitly one upon which the tax had not been paid could not be. Then, in 1955, the statute was rewritten to provide that "the larceny of any dog *upon which a license tax has or has not been paid* shall be a misdemeanor." (S. L. 1955, C. 804). (*Emphasis added*). The result seems to be under G. S. 14-84, that listing for taxes had never been essential, that before 1955 payment of the tax was essential, and that since that date, neither listing nor payments has been essential. In other words, we interpret the statute as if it now reads "the larceny of any dog . . . shall be a misdemeanor."

With respect to the remaining statutes, G. S. 67-15 makes "the larceny of any dog upon which aforesaid tax has been paid" a

misdemeanor, and G. S. 67-27 makes "any person who shall steal any dog which has been listed for taxation as herein provided" guilty of a misdemeanor. However, since G. S. 14-84 is the most recent enactment, and the chapter enacting it (S. L. 1955, C. 804) provides that "all laws and clauses of laws in conflict with this Act are hereby repealed", we do not believe that either G. S. 67-15 or G. S. 67-27 add any additional elements to the crime recognized in G. S. 14-84.

Robert Morgan, Attorney General
Myron Banks,
Assistant Attorney General

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8 April 1971

Subject: Criminal Law & Procedure; Search and Seizure; Contents of Search Warrant

Requested by: Honorable Elreta Melton Alexander
District Court Judge

Questions:

1. Is a search warrant sufficient to meet the requirements of G. S. 15-26 if nowhere on the face of the warrant is found a description of defendant's premises or vehicles or a description of the contraband or evidence being searched for; or is it a general warrant prohibited by Article 1, Section 20 of the North Carolina Constitution?

2. If the information appearing on the face of the search warrant is insufficient to describe the premises, place or thing to be searched or the contraband, may the affidavit attached to the warrant be incorporated by reference to supply any deficiencies which are patent on the face

of the warrant?

3. When the defendant challenges the magistrate's finding of probable cause asserting that the affiant could not possibly have observed the activities which he sets forth in his affidavit, may the trial court review the findings of fact of the magistrate upon which probable cause was found?

Conclusions:

1. Under the provisions of G. S. 15-26, the search warrant and affidavit are to be considered together in determining the validity of the warrant.

2. Yes.

3. Yes, upon a motion to suppress, the trial court must make a determination as to the validity of a search warrant in order to pass on the admissibility of evidence obtained thereunder.

In regard to Conclusion 1, the applicable statutes read as follows:

> "§ 15-26. *Contents of search warrant.*—(a) The search warrant must describe with reasonable certainty the person, premises, or other place to be searched and the contraband, instrumentality, or evidence for which the search is to be made.
>
> (b) An affidavit signed under oath or affirmation by the affiant or affiants and indicating the basis for the finding of probable cause must be a part of or attached to the warrant.
>
> (c) The warrant must be signed by the issuing official and bear the date and hour of its issuance above his signature."
>
> "§ 15-27. *Exclusionary rule.*—(a) No evidence

obtained or facts discovered by means of an illegal search shall be competent as evidence in any trial.

(b) No search may be regarded as illegal solely because of technical deviations in a search warrant from requirements not constitutionally required."

Under the provisions of G. S. 15-26, an affidavit indicating the basis for a finding of probable cause must be a part of or attached to the warrant; therefore, the affidavit becomes a part thereof. There is no necessity for a showing of the same detailed information appearing in the affidavit on the face of the warrant. The requirements of Article 1, Section 20, North Carolin Constitution, are met when the affidavit and warrant establish to a reasonable certainty: (1) That at the time complainant sought the warrant, he was in possession of information sufficient to establish probable cause for the issuance of the warrant; (2) that he made this information known under oath or affirmation to the official who issued the warrant; and (3) that the issuing official found probable cause for the issuance of the warrant based upon the information given him, under oath, by the complainant. *State v. Milton*, 7 N. C. App. 425 (1970); *State v. Roberts*, 276 N. C. 98 (1970).

In regard to Conclusion 2 as stated above, under the provisions of the applicable statute the warrant and affidavit are to be considered together and if the affidavit indicates a basis for finding probable cause, the State may present evidence upon *voir dire* as to what information was presented under oath to the official issuing the warrant. *State v. Milton, supra.*

In regard to Conclusion 3, upon a motion to suppress evidence obtained under a search warrant, the burden of establishing the validity of the warrant is upon the State. The State may present evidence in support of the warrant on *voir dire* that the burden is met if there are sufficient facts based on competent evidence which will support the necessary conclusions: (1) That at the time complainant sought the warrant, he was in possession of information sufficient to establish probable cause for the issuance of the warrant; (2) that he made this information known under oath or affirmation to the official who issued the warrant; and (3) that the issuing official found probable cause for the issuance of the warrant based

upon the information given him, under oath, by the complainant.

On the question of the use of information received from a confidential informant as basis for a finding of probable cause for an arrest or search, the court stated in *McCray v. Illinois*, 386 U. S. 300:

> "When the issue is not guilt or innocence but, as here, the question of probable cause for an arrest or search, the Illinois Supreme Court has held that police officers need not invariably be required to disclose an informant's identity if the trial judge is convinced, by evidence submitted in open court and subject to cross examination, that the officer did rely in good faith upon credible information supplied by a reliable informant."

This seems to be in accord with the North Carolina view as stated in *State v. Boles*, 246 N. C. 83.

The court further stated in *McCray v. Illinois, supra*:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors."

In the same case the Court further stated:

> "Indeed, we have repeatedly made clear that Federal officers need not disclose an informer's identity in applying for an arrest or search warrant."

This case goes on to state that a state court is under no absolute duty either under the due process clause of the Fourteenth

Amendment or the Sixth Amendment to require disclosure of an informer's identity at a pretrial hearing held for the purpose of determining only the question of probable cause for an arrest or search, where there is ample evidence in open court that the informer was known to the police officers and that they made the arrest in good faith, relying upon the information he supplied.

When sufficient facts are before the trial court on a motion to suppress to establish that the magistrate or other issuing official had before him facts based on the sworn statement of an affiant upon which probable cause could be found, such motion should fail.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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9 April 1971

Subject: Rivers and Streams; Navigable Waters, Closing of

Requested by: Mr. Carroll L. Mann, Jr.
State Property Control and
Construction Officer

Question: What is the proper action on the part of the State with regard to closing of a navigable stream in the event the State should deem it advisable to grant permission for its closing?

Conclusion: The power to regulate the use of navigable waters in the State, subject to the paramount power of the federal government, is in the General Assembly. State authorization for the closing of a navigable stream by the construction of a dike or dam must come from the

Legislature.

The Carolina Power and Light Company proposes to construct an off-stream cooling lake or reservoir adjacent to the Cape Fear River upstream from the L. V. Sutton Steam Electric Plant near Wilmington, North Carolina. The reservoir will be about 1,100 acres in extent and will completely envelop Catfish Creek, with the exception of a small portion of the creek at its mouth where it empties into the Cape Fear River. A dike or dam will be constructed around the perimeter of the reservoir. Catfish Creek is a coastal stream two or three miles in length, 50 to 100 feet in width and is about eight feet deep. The creek is considered navigable. A question has arisen as to the proper action on the part of the State with regard to the closing of a navigable stream, such as Catfish Creek in this instance, in the event the State should deem it advisable to grant permission for such a closing.

Subject to the paramount power of the federal government with respect to navigable waters of the United States, the power to regulate the use of navigable waters in the State is in the General Assembly. *Pedrick v. R.R.*, 143 N. C. 486 (1906); *State v. Dibble*, 49 N. C. 108 (1856). See also *Davis v. Jerkins*, 50 N. C. 291 (1858), wherein the following language may be found:

> "The river Neuse, at the place where plaintiff's toll bridge spans it, is a navigable stream, and being so, the defendants had the right to navigate it with their boats, at all times, without obstruction from any person, unless such obstruction were authorized by the sovereign power; this sovereign power would have been the General Government, had the Congress of the United States passed any act in relation to this river, in execution of the power 'to regulate commerce with foreign nations and among the several States.' Con. of U. S., Art. I, sec. 8; *Wilson v. Blackbird Creek Company*, 2 Pet., 248 (8 Curtis, 105). But as no such act was ever passed by Congress, the Legislature of this State is the only sovereign under whose authority a bridge or anything else could be erected whereby any impediment to the free navigation of the river

could be created." (*Citations Omitted*)

33 U. S. C. A. 401 provides, in pertinent part, as follows:

> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans therof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: . . ."

The General Assembly of North Carolina has on numerous occasions approved the closing or obstruction of navigable waters within the State by specific legislation authorizing construction of dams. However, there has been no specific legislative approval for the closing of Catfish Creek by Carolina Power and Light Company as set forth above. Nor has there been a delegation to any administrative agency or other authority of the power to generally approve such an obstruction. Therefore, permission for the closing of Catfish Creek by the construction of a dam or dike across it must come from the Legislature.

Robert Morgan, Attorney General
Roy A. Giles, Jr.,
Staff Attorney

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9 April 1971

Subject: Housing Authorities; Eminent Domain;

Restrictive Covenants

Requested by: Mr. Max Busby
City of Salisbury
Housing Authority Attorney

Question: May the Housing Authority of the City of Salisbury acquire a part of the property of a subdivision free of restrictive covenants by joining all remaining property owners in the subdivision in the initial condemnation action?

Conclusion: Yes.

North Carolina is in accord with the majority of the jurisdictions which hold that the violation of restrictive covenants encumbering other subdivision properties resulting from a taking for public use of a segment thereof raises, also, a right to compensation in the remaining owners within the subdivision. See *Raleigh v. Edwards*, 235 N. C. 671; 2 Nichols, Eminent Domain, Sec. 5.73(1). These incorporeal interests may be acquired by condemnation when these vested property rights are considered in the compensation to be awarded. (See G. S. 157-11 implemented by G. S. 40-11 to 40-29 inclusive for condemnation authority and procedure.) It should be noted that G. S. 40-23 provides that the court may determine who is entitled to the compensation in instances involving adverse and conflicting claimants to the money to be paid for the real estate taken.

Rules 19 and 20 of the Rules of Civil Procedure provide sufficient latitude for the joinder of diverse parties whose common interests have been damaged by a condemning authority. The joinder in a single condemnation action of all interest holders of properties subject to the restrictive covenants within a subdivision along with the owners of the tracts actually appropriated would seem to be proper if compensation for all interests is included in the damage estimate. Under Rule 20(b) and Rule 42(b) of the Rules of Civil Procedure, the court has authority to order a separate trial for separate issues or claims if this should become necessary or convenient.

Robert Morgan, Attorney General
R. Bruce White, Jr.,
Deputy Attorney General

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15 April 1971

Subject: Public Officers & Employees; State Employees; Educational Loans; Loans to Employment Applicants in the Form of the Payment of an Educational Loan Previously Made by the State Board of Social Services

Requested by: Mr. W. E. Early
Executive Director
N. C. State Comm. for the Blind

Question: If persons receive educational grants of money from the State Board of Social Services and are obligated to repay the money contingent upon their failure to work in the State Department of Social Services or a county department of social services for a stated period of time, may the State Commission for the Blind provide by its regulations for the Commission for the Blind to pay off, or ratify past payments of, such grants in order to employ, or continue to employ, the persons to whom such grants were made or are to be made, the training received by such persons under the grants being such as to fulfill the requirements of the Commission for the Blind, and such payments being subject to repayment or not subject to repayment in accordance with the requirements of the educational grant and leave program of the Commission

for the Blind?

Conclusion: Yes.

The certified appropriations budget sent to N. C. State Commission for the Blind by the Advisory Budget Commission shows a "line item" appropriation for "staff development and training" without any limiting provisions except for the total amount budgeted in the amount of $7,000. The Commission for the Blind could, of course, pay for the costs of education completed after the making of an educational grant, by the Commission, to an applicant for employment. It is a commonly accepted rule of statutory construction that the law does not require a vain thing. Therefore, no reason is perceived why the Commission for the Blind may not make a loan, by paying off a loan made by another State agency, for the purpose of paying for education completed but the cost of which the applicant for employment still owes such other State agency. It is significant that the money is being loaned by, and the services of the employee are being performed for, the State of North Carolina, regardless of which agency the loan or the services are channeled through.

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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21 April 1971

Subject: State Departments, Institutions & Agencies; Purchase and Contract; Public Bidding; Authority of Purchase and Contract Division to Purchase or Lease Equipment, or to Enter Into a Service Contract.

Requested by: Mr. Willis Holding, Jr.
Assistant State Purchasing Officer
Purchase and Contract Division
Department of Administration

Questions: (1) Whether State agencies through the Purchase and Contract Division can participate in an emergency medical communication system without following the statutory procedures prescribed by Chapter 143, Article 3, of the General Statutes?

(2) How may the State participate in the emergency medical communications system of the Regional Health Council of the Eastern Appalachia?

Conclusions: (1) No. The statutory procedure and requirements of public advertising, solicitation of bids and public bidding requirements are jurisdictional, mandatory, and must be complied with.

(2) The Purchase and Contract Division may participate in the emergency medical communications system by joining with the Regional Health Council of Eastern Appalachia and following the statutory procedure prescribed by Chapter 143, Article 3, of the General Statutes. The Purchase and Contract Division may in its sound discretion enter into a lease agreement or a service contract with the Regional Health Council of the Eastern Appalachia.

In letters from Willis Holding, Jr., Assistant State Purchasing Officer, Frank Leatherman, Communications Engineer of the Department of Administration, and Mrs. Fannie Bertalot, Comptroller for the Regional Health Council of the Eastern Appalachia, the following facts appear: The Regional Health Council of Eastern Appalachia, Inc., a non-profit corporation, has received or will receive a grant under the Appalachian Regional Development Act of 1965, 40 U. S. C. A. App., for the installation of an emergency medical communications system to serve the four counties of McDowell, Alexander, Burke, and Caldwell. The system will serve state, county and municipal agencies as well as other non-profit corporations. The federal grant for equipment is in excess of $200,000, and the federal

grant will pay 80 per cent of the entire cost. The participating members will be required to pay 20 per cent of the equipment cost that it receives, plus a pro rata share of the control center equipment costs used in common by all members. The estimated cost of the equipment for the State institutions is expected to greatly exceed $2,000. An engineer with the Department of Administration and a telecommunications engineer with HEW assisted in preparing the specifications for the system. Broughton Hospital and Western Carolina Center of the Department of Mental Health desire to participate in the program.

In the letter from Mrs. Bertalot it is not clear whether the equipment is to be purchased by the participants, leased, or to be a contract for service based on a 20 per cent cost of such equipment.

The Purchase and Contract Division inquires whether the State can purchase equipment in the program without following the requirements of Chapter 143, Article 3, of the General Statutes. The answer to this question is no. Similar statutes requiring competitive bidding after proper notice and advertising have been held mandatory and a contract made in contravention of such was *ultra vires* and void. *Raynor v. Comrs. of Louisburg*, 220 N. C. 348, 17 S. E. 2d 495 (1941); *Teer Company v. Highway Comm.*, 265 N. C. 1, 143 S. E. 2d 247; *Teer Company v. Highway Comm.*, 4 N. C. App. 126, 166 S. E. 2d 705 (1969). The purpose of Chapter 143, Articles 3 and 8, General Statutes of North Carolina, is to prevent favoritism, corruption, fraud and imposition in the awarding of public contracts by giving notice and assuring competition, thereby guaranteeing reasonable contracts in the expenditure of public money. *Mullen v. Louisburg*, 225 N. C. 53, 33 S. E. 2d 484 (1945). Standard specifications can be formulated and numerous contracts have been awarded for similar equipment, and this contract does not come within the exceptions of G. S. 143-54.

Since the equipment to be used in the emergency medical communications system must be compatible, it would appear that the Purchase and Contract Division could join with the Regional Health Council of Eastern Appalachia in soliciting bids, public advertising, and receiving sealed bids in the usual manner following the requirements of Chapter 143, Article 3, of the General Statutes.

The equipment requirements for the complete system are greater than for State use alone and should produce more competitive bidding.

> "Contracts for the renting of real property or the hire of chattels generally are not considered within provisions requiring contracts for work, supplies, or materials to be let upon competitive bidding, . . ." 43 Am. Jur., *Public Works and Contracts*, sec. 27, p. 769.

Ordinarily, service contracts are not within the purview of statutes requiring advertising and public bidding for supplies, materials, and equipment. 43 Am. Jur., *Public Works and Contracts*, sec. 28; see also 15 ALR 3d 733. "The better reason dictates the conclusion that the statute applies only to contracts in relation to supplies and materials where the bidders have the right to name the price for which they are willing to furnish the same." *Mullen v. Louisburg, supra.*

G. S. 143-49(3) authorizes the Director of Administration to purchase on contract for telephones, telegraph, electric light power, postal and any and all other contractural services and needs of the State government or to authorize any departments, institutions, or agencies to enter into such contracts.

From the foregoing authorities the Purchase and Contract Division may in its sound discretion purchase the equipment by following the statutory procedure, lease the equipment, or participate on a service contract. Competitive bidding, where possible, is always desirable even though not legally required.

Robert Morgan, Attorney General
William B. Ray,
Assistant Attorney General

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21 April 1971

Subject: Motor Vehicles; Drivers' Licenses; Limited

Driving Privileges

Requested by: Honorable Robert A. Collier, Jr.
Resident Superior Court Judge
Twenty-Second Judicial District

Question: By virtue of Chapter 15, Session Laws of 1971, codified as G. S. 20-36, is a person convicted of driving while under the influence of intoxicating liquor, who has no previous conviction of a similar offense within 10 years next preceding, eligible for limited driving privileges under G. S. 20-179(b) (1)?

Conclusion: No. Chapter 15, Session Laws of 1971, deals solely with action by the North Carolina Department of Motor Vehicles. It does not affect G. S. 20-179(b) (1) in any way. It cannot therefore authorize issuance of limited driving privilege by the court to a person who has a prior conviction for driving while under the influence of intoxicating liquor.

New G. S. 20-36 reads as follows:

> "§ 20-36. *Ten-year-old convictions not considered.*–No conviction of any violation of the motor vehicle laws shall be considered by the Department in determining whether any person's driving privilege shall be suspended or revoked or in determining the appropriate period of suspension or revocation after 10 years has elapsed from the date of such conviction."

While it restricts action by the Department of Motor Vehicles, it does not purport to affect action by the courts under G. S. 20-179(b) (1).

G. S. 20-179(b) (1) provides that a limited driving privilege can be

issued "Upon a first conviction only . . .".

This office has previously ruled as follows:

> "The time period between convictions is immaterial. Before a limited driving privilege may be allowed, it must appear that the conviction is defendant's first numerical conviction." 40 N.C.A.G. 422, Opinion of 21 October 1969 to W. E. Crosswhite, Solicitor, Statesville Recorders Court.

The effect of new G. S. 20-36 is not to automatically remove convictions older than 10 years from a person's driving record; it is merely to prohibit the Department from considering such convictions in determining departmental action.

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

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29 April 1971

Subject: Taxation; Ad Valorem; Situs; Airplanes; G. S. 105-302(d)

Requested by: Mr. John R. Jenkins, Jr.
Bertie County Attorney

Question: Where is the tax situs of privately owned airplanes which when not in use are in hangars or other structures or are secured and tied down upon areas of a tri-county airport which is located entirely within one of the three counties operating the airport through a tri-county airport authority?

Conclusion: Privately owned airplanes which when not in use are located in hangars or other

> structures or are secured and tied down upon areas of a tri-county airport situated entirely within one of the three counties have a tax situs in the county wherein they are located.

Chapter 854 of the 1961 Session Laws created the Tri-County Airport Authority as a body corporate. The airport was intended to serve the three counties of Northhampton, Hertford and Bertie. The airport facility is physically located in Hertford County. Residents of the three counties store their airplanes at the airport when not in use. The planes are either stored in hangars or tied down on the apron adjoining the runways.

Section 4 1/2 of Chapter 854 of the 1961 Session Laws expressly provides that the airport shall not be construed as a government agency or instrumentality of any of the respective counties. G. S. 105-296(13) enacted by Chapter 1160 of the 1967 Session Laws exempts the property owned by airports from taxation. Privately owned aircraft are not exempted by the statute.

Since the question of tax situs has not been determined by the law creating the airport, the rules of situs provided in the Machinery Act will govern. Generally all tangible personal property is listed in the township in which the owner has his residence. G. S. 105-302(a). There are a number of exceptions to this rule. Some of the exceptions are provided in G. S. 105-302(d). G. S. 105-302(d) provides:

> ". . .(T)angible personal property shall be listed in the township in which such property is situated, rather than in the township in which the owner resides, if the owner or person having control thereof hires or occupies a . . . place for storage . . . for use in connection with such property."

The word "situated" as used in subsection (d) means a more or less permanent location requiring more than a mere temporary presence in a particular place. *In Re Freight Carriers*, 263 N. C. 345 (1955). The airplanes in question here are stored at the airport on a year-round basis except when in actual use. The airport then would

be their "more or less permanent location."

The storage of airplanes in hangars and by tying them down on the apron of the airport is an accepted method of storage for airplanes. The airplanes stored in Hertford County at the Tri-County Airport are taxable by Hertford County. Cf. Attorney General Opinion to Honorable L. H. Ross on November 8, 1955, Attorney General Opinion to Honorable Charles O. Whitley on September 25, 1953; and Attorney General Opinion to Honorable J. C. Ellis on April 7, 1953.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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29 April 1971

Subject: Motor Vehicles; Driver's Licenses; Drunken Driving; Blood Test; Willful Refusal to Submit

Requested by: Mr. Robert Powell
Assistant Solicitor
Twenty-Seventh Judicial District

Questions: (1) Does failure to warn person arrested for operating a motor vehicle under the influence of alcoholic beverage of his rights to call counsel and to select a witness to view the testing procedure render the test results inadmissible?

(2) Must the warning required under the provisions of G. S. 20-16.2 be given by the arresting officer?

Conclusions: (1) Yes, if the person arrested is conscious.

(2) No.

In regard to Conclusion 1, the applicable portion of G. S. 20-16.2 reads as follows:

> "§ 20-16.2(a) . . . Before any of the tests shall be administered, the accused person shall be permitted to call an attorney and to select a witness to view for him the testing procedures; providing, however, that the testing procedures shll not be delayed for these purposes for a period of time of over thirty minutes from the time the accused person is notified of these rights.
>
> "(b) Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this section and the test or tests may be administered, subject to the provisions of G. S. 20-139.1."

In our opinion, under the provisions of G. S. 20-16.2, a duty is placed upon the arresting officer to give the required warning or cause such to be given.

Considering subdivision (a) and (b) in *pari materia*, an unconscious person can be placed under arrest, thereby satisfying the requirements for arrest as provided in subdivision (a). Subdivision (b) specifically provides for the administering of the test and therefore is controlling and creates no conflict with the warning requirements required in subdivision (a). Permission is not required to take blood specimens under the federal holdings. *Schmerber v. California*, 384 U. S. 737.

In regard to Conclusion 2, the applicable statutes require that the defendant be warned of his rights; however, they do not specify who is to give such warning. In our opinion, as long as the defendant is properly warned, the requirement of the statute is met.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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29 April 1971

Subject: Taxation; Ad Valorem; Exemptions; Property Held for Resale; G. S. 105-296, 105-297

Requested by: Mr. Sim A. DeLapp
Davidson County Attorney

Question: Is a lot owned by the High Point Sheltered Workshop, Inc., which is held for resale, subject to the ad valorem tax even though the property is unused and nonproductive?

Conclusion: A lot owned by the High Point Sheltered Workshop, Inc., which is held for resale is subject to the ad valorem tax even though the property is nonproductive.

Property held for resale by a charitable or religious organization is subject to the ad valorem tax. *United Brethren v. Commissioners*, 115 N. C. 489(1894); and Attorney General Opinion to the Honorable F. P. Parker, Jr., on 5 October 1950. The fact that the property is nonproductive is not determinative here. To be exempt from taxation, the taxpayer must bring himself within the provisions of G. S. 105-296 and G. S. 105-297. The taxpayer has failed to bring himself within these provisions in this case. Barring further information, the property is subject to the tax.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.
Assistant Attorney General

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29 April 1971

Subject: Social Services; Blind, Assistance for; Administrative Funds; Payments to County Treasuries.

Requested by: Mr. Sherley Blackburn
Deputy Director of Social Services
State Commission for the Blind

Question: When the Commission for the Blind receives federal funds to be used for administrative purposes in the aid to the blind program and such funds are to be transmitted to the counties in payment for the services of the county departments of social services rendered, on county time and by county social services employees, in the aid to the blind program, should such funds be made payable to the counties for deposit in the county treasuries or should they be made payable to the county board or department of social services?

Conclusion: When the Commission for the Blind receives federal funds to be used for administrative purposes in the aid to the blind program and such funds are to be transmitted to the counties in payment for the services of the county departments of social services rendered, on county time and by county social services employees, in the aid to the blind program, such funds should be made payable to the counties for deposit in the county treasuries and should not be made payable to the county board or department of social services.

G. S. 155-7 provides that "it is the duty of the treasurer to receive all moneys belonging to the county,. . .and to apply them and render account of them as required by law."

Since the funds in question are earned on county time by county employees, in the performance of governmental functions, it appears that the funds are "moneys belonging to the county" within the meaning of the portion of G. S. 155-7 quoted above, and, therefore, that the funds should be paid to the county for deposit in the county treasury rather than to the county board or department of social services.

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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29 April 1971

Subject: ABC Act; Board, ABC; Conflict of Interest; Disqualification From ABC Board by Reason of Relationship; G. S. 18-43.

Requested by: Mr. Morrison McKenzie
Maxton Town Manager

Question: Is a person whose wife is the niece by marriage of a whiskey salesman disqualified for membership on a local ABC board under G. S. 18-43?

Conclusion: Yes. "Related" includes persons connected by marriage of affinity. G. S. 18-43 disqualifies a person from membership on an ABC Board if the person is interested directly or indirectly in a brewery, distillery or other enterprise that produces, mixes, bottles or sells alcoholic beverages, or who is related to any person interested or associated in business with any person so interested.

Clearly the whiskey salesman comes within the meaning of the

statute; thus, the real question is whether the salesman is related to the person who is a member of the ABC board.

G. S. 18-43 was enacted by Chapter 49, Public Laws of 1937, and contained the words "by blood or marriage to any degree whatsoever." However, Chapter 411, Public Laws of 1937 amended Chapter 49 by deleting the quoted words above.

We do not know why the General Assembly deleted this language unless it felt the word "related", which preceded the phrase, was broad enough in its generic sense to include the quoted phrase, and thus was redundant or verbiage.

In any event, it is clear that the intent of G. S. 18-43 is to prohibit interests and relationships which would tend to have an unwholesome influence upon members of ABC boards who are public officers.

The word "related" or "relative" is defined in several dictionaries as including connections by blood or marriage.

Black's Law Dictionary–"A kinsman; a person connected with another by blood or affinity. When used generically, includes persons connected by ties of affinity as well as consanguinity, and when used with a restrictive meaning, refers to those only who are connected by blood." See also Webster's New International Dictionary, Second Edition.

"The word relative is considered to be a broad, general, comprehensive, and indefinite term, which has often perplexed the courts. . . .In common use, the term is employed to include all persons who are connected by blood or affinity." 76 C.J.S. 623; *Bank of California v. Turner*, 74 P. 2d 987; *Liprie v. Ins. Co.*, 143 So. 2d 597; *Culmo v. Andrews*, 258 N.Y.S. 2d 255; *Petition v. U.S.*, 418 F. 2d 264; *Estate v. Sowash*, 62 Cal. App. 52; *People v. Grimes*, 95 P. 2d 486.

The term includes connections by blood or affinity. Affinity includes relationships by marriage between a husband and his wife's blood relations and between wife and her husband's blood relations. *Graham v. Thompson*, 125 S. W. 2d 133.

It includes a brother-in-law. *McCanless v. State*, 181 S. W, 2d 154, the wife of a person's grand-nephew, though she is not related by blood. *Bennett v. Van Riper*, 22 A. 1055.

In *Fidelity and Casualty Co. of N.Y. v. Jackson*, 297 F. 2d 230, it is stated that the word denotes both those connected to a person by blood and those connected by marriage; that it is a more comprehensive term than "kin," and embraces kin, kinsfolk, and kindred, as well as in-laws.

The Attorney General interprets the laws as written by the General Assembly. If the General Assembly desires to establish the degree of relationship to which G. S. 18-43 would have no application, then it should amend the statutes to so specify.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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29 April 1971

Subject: Taxation; Franchise Taxes; Indebtedness; Equity Capital; Deductions From Tax Base; G. S. 105-122(b)

Requested by: Mr. W. B. Matthews, Director
Corporate Income & Franchise
Tax Division
North Carolina Dept. of Revenue

Question: Is equity capital (issued and outstanding capital stock, surplus and undivided profits) of a wholly owned subsidiary an "indebtedness" owed to the parent corporation which the parent is entitled to deduct from its franchise tax base?

Conclusion: The equity capital of a wholly owned

subsidiary does not represent "indebtedness" owed to a parent corporation which the parent is entitled to deduct from its franchise tax base.

Inquiry has been made with respect to the franchise tax upon corporations as to whether the equity capital (issued and outstanding capital stock, surplus and undivided profits) of a wholly owned subsidiary represents "indebtedness" owed to the parent corporation which the parent is entitled to deduct from its franchise tax base. The inquiry is based upon the following hypothetical: Corporation A is the parent of Corporation X, a wholly owned subsidiary of Corporation A. Corporation B is the parent of Corporation Y, a wholly owned subsidiary of Corporation B. Both Corporation A and Corporation B have total capital accounts of $20,000,000. Corporation A capitalizes Corporation X for $10,000,000 with equity capital, with $5,000,000 allocated to the capital stock account and $5,000,000 allocated to the capital surplus account. Corporation B also capitalizes its subsidiary, Corporation Y, for $10,000,000 but chooses to use debt capital instead of equity capital. Consequently, Corporation B lends Corporation Y $10,000,000.

Bearing upon the question are the following provisions contained in G. S. 105-122(b):

> "Every such corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus, and undivided profits. . . .
>
> "Every corporation doing business in this State which is a. . . subsidiary. . . of another corporation shall add to its capital stock, surplus and undivided profits *all indebtedness owed to . . . a parent*. . . as a part of its capital used in its business and as a part of the base for franchise tax under this section. The term 'indebtedness' as used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by a parent. . . .

> "Further, in case the creditor corporation as above specified is also taxable under the provisions of this section, such creditor corporation shall be allowed to deduct from the total of its capital, surplus and undivided profits the *amount of any debt owed to it* by a . . . subsidiary. . . corporation to the extent that such debt has been included in the tax base of said. . . subsidiary. . . debtor corporation reporting for taxation under the provisions of this section. . . ." (*Emphasis added.*)

The taxpayer, at whose suggestion the inquiry has been made, contends that it is the intent of the franchise tax to determine the capital base of Corporation A and Corporation X, and of Corporation B and Corporation Y, in the same manner for the purpose of the franchise tax. To illustrate, taxpayer argues that the capital furnished by Corporation A to Corporation X ($10,000,000) would constitute affiliated indebtedness to Corporation X and would constitute Corporation X's capital base for franchise tax purposes, and that the same would be true for Corporations B and Y, Corporations A and B thus being entitled to deduct $10,000,000 each for the affiliated indebtedness, making the franchise tax base of each $10,000,000.

To reach that result, taxpayer concludes that the term "indebtedness" (which is defined to include "capital of whatsoever nature furnished by a parent") necessarily includes the capital stock, surplus and undivided profits of Corporation X, which is deductible by Corporation A under G. S. 105-122(b) as a "debt owed to it by a subsidiary corporation."

We are unable to agree. It is true that "capital of whatsoever nature furnished by a parent" may be substituted for "indebtedness" according to the definition of "indebtedness" in G. S. 105-122(b), and for the sake of argument it may be conceded that "capital stock, surplus and undivided profits" is encompassed in "capital of whatsoever nature furnished by a parent," and therefore substitutable for "indebtedness." If so, the statute would then read: ". . . such creditor corporation shall be allowed to deduct from the total of its capital, surplus and undivided profits the amount of any capital stock, surplus and undivided profits *owed to it by*

a . . .subsidiary. . .," and therein lies the flaw in taxpayer's position. The statute requires that the capital defined as "indebtedness" be *owed* to the parent, and "owedness," to coin a word, is not a feature of that kind of capital, between corporation (subsidiary) and shareholder (parent).

The reports are replete with cases holding that shareholders are not "creditors" of a corporation by virtue of their status as shareholders. For example, see: *Curtiss v. Wilmarth*, 254 Mich. 242, 236 N.W. 773; *Ex parte Miller*, 191 S.C. 260, 1 S.E. 2d 512; *Federal Deposit Ins. Corp. v. Dept. of Financial Institutions*, 113 Ind. App. 14, 44 N.E. 2d 992.

The distinction between the two is readily recognized:

> "The essential difference betwen a 'stockholder' and a 'creditor' is that a stockholder invests in a corporate venture and takes the risk of loss in order to share in the profit, and the creditor does not intend to take such risks, but merely lends his capital to others who do take them."
>
> *Security Finance & Loan Co. v. Koehler*, D.C. Kan. 210 F. Supp. 603.
>
> "The final criterion in distinguishing between a 'creditor' and a 'shareholder' is the contingency of payment, and the fact that ultimately one must be paid a definite sum at a fixed time marks his relationship to the corporation as that of a creditor rather than a shareholder."
>
> *C.I.R. v. Page Oil Co.*, C.C.A., 129 F. 2d 748.

Since whether a shareholder is entitled to distribution of a corporation's equity capital is so clearly contingent and problematical, we do not believe that a corporation's capital could in any fair sense be said to be "owed" to a parent-shareholder, and not being "owed," may not be deducted from the parent's tax base.

Another consideration impels us to the same conclusion.

G. S. 105-122(b) establishes the tax base essentially to be "issued and outstanding capital stock, surplus and undivided profits," for both parent and subsidiary, and if anything *further* is required to be added to the base of the one, it may be deducted from the base of the other. In our example, that which must be added is "indebtedness owed to a parent," and that which may be deducted is "indebtedness owed by a subsidiary." If "indebtedness" does include "capital stock, surplus and undivided profits" for the purpose of the deduction, then "indebtedness" must include the same elements for the purpose of the addition, with the anomalous result that a subsidiary's capital stock, surplus and undivided profits (read "indebtedness") would have to be added to its capital stock, surplus and undivided profits. We do not believe that the Legislature intended it to be so read.

The taxpayer points out the following result from the foregoing conclusion: If "indebtedness" does not include capital stock, surplus and undivided profits, then Corporation A would have a franchise tax base of $20,000,000, while Corporation B would have a base of only $10,000,000, although the only difference in the structure of the two is the manner in which they chose to capitalize their subsidiaries. We can only observe that the General Assembly has the authority to establish the measure of the franchise tax and that the measure chosen produces the result. The corporations, when they established their subsidiaries, had an opportunity to effect that measure in the manner in which they capitalized their subsidiaries, and in so doing determined the tax upon their privilege of doing business upon different bases.

To summarize, we are of the opinion that the equity capital of a wholly owned subsidiary does not present "indebtedness" owed to the parent corporation which the parent is entitled to deduct from its franchise tax base.

Robert Morgan, Attorney
Myron C. Banks,
Assistant Attorney General

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29 April 1971

Subject: Taxation; Ad Valorem; Foreclosure; Joint Foreclosure by City County Tax Collector; G. S. 105-391(j)

Requested by: Mr. Michael D. Lea
Thomasville City Tax Attorney

Question: Where a city and a county have employed pursuant to agreement a single tax collector for the collection of ad valorem taxes for both the city and county, may separate foreclosure actions be brought under G. S. 105-391(j) on tax liens of the city and county on the same parcel of land?

Conclusion: Liens of different taxing units on the same parcel of land representing taxes subject to collection by the same collector must be foreclosed in one action under G. S. 105-391(j).

The method of foreclosure in question here is G. S. 105-391. G. S. 105-391(j) provides as follows:

> "(j) *Joint Foreclosure by Two or More Taxing Units.*–Liens of different taxing units on the same parcel, representing taxes in the hands of the same collector, shall be foreclosed in one action. Liens of different taxing units of the same parcel, representing taxes in the hands of different collectors, may be foreclosed in one action in the discretion of the governing bodies. . . ."

Generally, the word "shall" is construed to be mandatory, unless the intent is clearly shown to be otherwise. *Puckett v. Sellars*, 235 N. C. 264 (1952); *Poole v. Board of Education*, 186 N. C. 227 (1923); and *Battle v. Rocky Mount*, 156 N. C. 329 (1911). The word "shall" as used in subsection (j) of G. S. 105-391 is clearly mandatory. The mandatory intent of the word "shall" in subsection

(j) is emphasized by the use of the permissive word "may" later on in the first paragraph of subsection (j). If the legislature had meant for the first sentence to be permissive as well, they would not have drawn a distinction between the two types of foreclosures, nor would they have used the word "shall" in one and the word "may" in the other.

From the foregoing, it seems clear that when a foreclosure action is brought under G. S. 105-391 for liens of different taxing units on the same parcel of land representing taxes in the hands of the same collector, the foreclosure must be joint. This opinion does not cover foreclosure brought under G. S. 105-392 or G. S. 105-414.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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3 May 1971

Subject: State Departments, Institutions and Agencies; Zoological Authority; Appropriation; Violation of Condition

Requested by: Honorable G. Hunter Warlick
House of Representatives
State Legislative Building

Question: Has the North Carolina Zoological Authority forfeited its right to the existing unexpended and unencumbered portion of the 1969 appropriation to the Authority because of violation of one of the conditions attached to the appropriation?

Conclusion: The North Carolina Zoological Authority forfeited its right to the existing

unexpended and unencumbered portion of the 1969 appropriation to the Authority because of violation of one of the conditions attached to the appropriation.

The North Carolina Zoological Authority was created as a State agency by Chapter 1104 of the General Statutes of 1969, codified as G. S. 143-171 through G. S.s 143-177.3. Chapter 1271 of the Session Laws of 1969 appropriated certain funds to the Authority subject to certain conditions. The act in its entirety is set out below:

CHAPTER 1271

AN ACT TO APPROPRIATE FUNDS TO ACQUIRE, CONSTRUCT, MAINTAIN AND OPERATE A STATE ZOO.

The General Assembly of North Carolina do enact:

Section 1. There is hereby appropriated out of the General Fund of the State to the North Carolina Zoological Authority the sum of two hundred fifty thousand dollars ($250,000.00) for the biennium (1969-71), to be used by said Authority for the purpose of aiding said Authority in the establishment of a Zoological Garden in North Carolina, subject to the following conditions:

a. Fifty thousand dollars ($50,000.00) of said funds shall be transferred to said Authority within ninety (90) days after said Authority is organized to enable the Board of Directors to use said funds, in combination with other available funds, to begin the selection of a site and the basic plan for said Zoological Garden.

b. The balance of said appropriation shall be transferred upon the approval of the Governor and the Advisory Budget

Commission, either as one sum or several sums, upon the condition that a reasonable plan is presented to said Governor and the Advisory Budget Commission, which will indicate public support of a Zoological Garden and the availability of a substantial amount of non-state funds for that purpose.

c. It is a condition of this appropriation that the North Carolina Zoological Authority will not seek additional appropriations from the General Fund during future sessions of the General Assembly.

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. This Act shall become effective July 1, 1969.

Some of the appropriation has been expended pursuant to the provisions of paragraphs (a) and (b) of Section 1 of the appropriation act. The specific question presented now is whether the condition set forth in paragraph (c) has been violated and, if so, whether this would bar the Authority's right to receive and expend the unused portion of the appropriation.

More specifically the question is whether or not the Authority did "seek additional appropriations from the General Fund" during the 1971 Session of the General Assembly?

On February 16, 1971, the Chairman of the Board of Directors of the North Carolina Zoological Authority appeared before the Joint Appropriations Committee and orally made a request for an appropriation to the Authority of $2,000,000.00 for capital improvements. The request was supported by a detailed explanation of the need for the purposes of the proposed appropriation which is indicated on page 7 of the "General Fund Appropriation."

Events preceding the appearance of the Chairman before the Joint

Appropriations Committee are described in a letter dated February 26, 1971, from the Chairman to the Attorney General's Office which letter reads, in part, as follows:

> "As Chairman of the State Zoo Authority I received a written form memorandum dated February 5, 1971, from Sen. John Henley and Rep. Kenneth Royall, Jr., chairmen of their respective Legislative Appropriations Committees, outlining the schedule of appearances by State Departments, agencies and institutions before their supplemental appropriations hearings. A copy of this memorandum is attached. Note the State Zoo Authority was scheduled to appear from 3:00 - 3:30 p. m. on Wednesday, February 17, 1971.
>
> "I had previously been called at my office by a man whose name I cannot recall asking if the State Zoo Authority would desire such an appearance. I assured him we did have interest in appearing and he assured me this was in order and he would schedule it.
>
> "Following receipt of the attached memorandum I was called by a gentleman who, I believe, said he was with the Budget Division and requested my cooperation in rescheduling the Zoo appearance. He stated it was inconvenient for several others to meet their schedule and since I was local would I mind changing times and days. I assured him I did not mind but did request our agency be changed to the Tuesday, February 16, 1971, date with a 3:00 time. He agreed.
>
> "I was later called and told our Authority should be present at 2:00 p.m. in case the Joint Appropriations Committee could get to us earlier and advised our time had been extended to thirty minutes. I agreed.
>
> "During the past summer when the Advisory Budget Commission was meeting we declined to make an appearance since we did not have, at that time, a documented program. We knew we would have our information available later in the year and, therefore, did not feel we could justify time before the Commission then.

* * * * * *

" I am aware, of course, that language in the original bill stated the Authority would not attempt to seek additional funds from the General Assembly; however, that was written into the initial bill requesting the $1.2 million which was not appropriated. When it became obvious that the requested amount would not be forthcoming we still felt we would not have to ask for any additional planning or operating funds beyond the $250,000 but would have to seek capital improvement funds, which we are doing."

Under the facts set out above, it must be concluded that the Authority did seek additional appropriations from the General Fund during the 1971 Session of the General Assembly. Appearance before the Joint Appropriations Committee is a usual and conventional method of seeking legislative appropriations. The condition is not limited to a restriction on seeking operating or maintenance funds for the Zoo as opposed to capital improvements but, instead, is all inclusive.

Therefore, a condition of the 1969 appropriation to the Authority has been broken and the Authority would not be entitled at this time to receive and expend the unexpended and unencumbered portion remaining from the 1969 appropriation.

There is, of course, nothing in law which would prevent the General Assembly of 1971 from repealing the restriction discussed above and providing for payment of the unexpended portion to the Authority, just as there is nothing in law that would prevent the 1971 General Assembly or the General Assembly of any future session from making such appropriation to the Authority as it might deem wise and proper.

Robert Morgan, Attorney General
Harry W. McGalliard,
Chief Deputy Attorney General

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3 May 1971

Subject: State Departments, Institutions & Agencies; State Highway Commission; Highways, Abandonment of; Corps of Engineers

Requested by: Mr. John Davis
Chief Engineer
State Highway Commission

Question: Can the State Highway Commission abandon a portion of a secondary road which was on the county road system in 1931 which will be flooded by the New Hope Reservoir without the approval of the Chatham County Board of Commissioners?

Conclusion: Yes. The reservoir will be under the exclusive ownership and control of the Federal Government and, therefore, pursuant to the provision of G. S. 136-60, the Highway Commission may be relieved of all responsibility for the road without the approval of the Board of County Commissioners.

According to a letter of April 13, 1971, and an attached memorandum, an area being flooded by the New Hope Reservoir includes 1.1 mile of SR #1008 as it crosses Little Beaver Creek between Bonsal and Wilsonville in Chatham County. The reservoir is being constructed by the Army Corps of Engineers. According to information furnished this office, the Army Corps of Engineers has acquired all real property for the reservoir lying below the flood elevation including property on both sides of SR # 1008 being flooded in the vicinity of Little Beaver Creek.

The Corps of Engineers advises that the expenditure of 1.7 million dollars to raise SR #1008 at Little Beaver Creek is not justified. The Board of County Commissioners advises that it will not consent to the Commission abandoning that section of SR #1008. The Chief

Engineer inquired of this office whether the consent of the Board of County Commissioners is necessary.

G. S. 136-60 provides that no road, which shall be a part of any county road system as the same was taken over by the State Highway Commission in 1931 pursuant to G. S. 136-53, shall be abandoned or materially changed without consent of the Board of County Commissioners of the county in which the said road is located, "*except the State Highway Commission may be relieved of all responsibility for county roads in areas where the Federal Government acquires exclusive ownership and control.*" (*Emphasis added.*) In view of the fact that the Federal Government has exclusive ownership and control of the New Hope Reservoir site, the State Highway Commission may be relieved of all responsibility of the area of SR # 1008 at Little Beaver Creek which is being flooded by the New Hope Reservoir project without the consent of the Board of County Commissioners.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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3 May 1971

Subject: Taxation; Ad Valorem; Situs; Tobacco Curers and Fuel Tanks; G. S. 105-302(d)

Requested by: Mr. I. J. Horton
Greene County Attorney

Questions: (1) Where tobacco curers and fuel tanks are owned by a resident of "B" county and are situated year round from year to year in or on tobacco barns in "A" county under a straight lease or lease-purchase agreement with the holder or lessee in possession having an equity of redemption, where should the property be listed for

taxes?

(2) Where fuel tanks are owned by a fuel firm which is a resident of county "B" and the tanks are located on the premises of a resident of county "A" for storage of fuel for use in heating and cooking and the tanks are exchanged frequently to be refilled, where should the tanks be listed for taxes?

Conclusions:

(1) Tobacco curers and fuel tanks owned by a resident of "B" county and situated on tobacco barns in "A" county belonging to a resident of "A" county which holds possession of the tank by a straight lease, a lease-purchase agreement, or is the owner of the equity of redemption, the property should be listed in county "A".

(2) Fuel tanks owned by a fuel firm which is a resident of county "B" which are located on the premises of a resident of county "A" for the storage of fuel for use in heating and cooking and which are exchanged frequently to be refilled should be listed in the township where they are stored and refilled.

(1) In general, all personal property shall be listed in the name of the owner on the day the property is assessed. G. S. 105-304. Where the property is subject to a security interest, the owner of the equity of redemption in the property is deemed to be the owner of the property. G. S. 105-304(a). If a lease-purchase agreement amounts to a sale and a security interest, the lessee (vendee) should list the property in the county wherein he resides. Attorney General Opinion to Mr. F. W. McGowan on 4 February 1948. Otherwise, leased property should generally be listed in the name of the lessor as stated in an Attorney General Opinion to Mr. E. R. Eller on 9 April 1954.

Generally all tangible personal property is listed in the township in which the owner has his residence. G. S. 105-302. There are a number of exceptions to this rule, one of which is contained in G. S. 105-302(d). G. S. 105-302(d) provides:

> "(d). . . (T)angible personal property shall be listed in the township in which such property is situated, rather than in the township in which the owner resides, if the owner or person having control thereof hires or occupies a store, mill, dockyard, piling ground, place for the sale of property, shop, office, mine, farm, place for storage, manufactory or warehouse therein for use in connection with such property . . . ."

In this case the possessor or owner rents or occupies a farm which is used in connection with the curers and fuel tanks. The curers and tanks are there on a more or less permanent basis. *In Re Freight Carriers*, 263 N. C. 345 (1964). Therefore, the curers and fuel tanks should be listed in the townships where they are located.

(2) Generally, personal property should be listed in the township wherein the owner resides. G. S. 105-302. If the owner is a corporation, it should be listed where the corporation has its principal office within this State. G. S. 105-302(a). The small tanks may fall within the exception provided in subsection (d) of G. S. 105-302. Cf. Attorney General Opinion to Mr. B. R. Ingram on 23 July 1968, 40 N.C.A.G. 823. To qualify for the subsection (d) exception, the owner must rent or occupy one of the listed locations, e.g., mill or storage area for use in connection with the property. From the facts given, the small tanks may qualify for a subsection (d) situs.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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5 May 1971

Subject: Taxation; Ad Valorem; Exemptions; Real Property; Doctors' Building Owned by Nonprofit Hospital Corporation and Rented to Private Practitioners; G. S. 105-296(10)

Requested by: Mr. Miles B. Fowler
Clinton City Attorney

Question: Is a doctors' building owned and built by a nonprofit hospital corporation for the purpose of rental to private practitioners, and which is built on land owned by the corporation adjacent to a county-owned hospital, subject to ad valorem taxes?

Conclusion: A doctors' building owned and built by a nonprofit hospital corporation for the purpose of rental to private practitioners, and which is built on land owned by the corporation adjacent to a county owned hospital, is subject to ad valorem taxes.

G. S. 105-296, relating to real property exempt from ad valorem taxes, provides that certain enumerated property "and no other" shall be exempt from taxation. Subsection (10) of this statute provides that real property which is held for or owned by hospitals organized and operated as nonstock, nonprofit, charitable institutions and which is "actually used for hospital purposes" shall be exempt.

In *Sparrow v. Beaufort County*, 221 N.C. 222, 19 S. E. 2d 861, the Supreme Court held with regard to the exemption of property held for charitable purposes that the exemption is not applicable to all property owned by charitable organizations, but only to property held for charitable purposes. In this case the Court stated:

> "Property held for any of these purposes is supposed to be withdrawn from the competitive field of

commercial activity . . . But when it is thrust into the business life of the community it loses its sheltered place, regardless of the character of its owner, for it is held for profit or gain . . . It is not the character of the corporation or association owning the property which determines its status as respects the privilege of exemption, but the purpose for which it is held."

Therefore, where property owned or held by a hospital is leased or rented to doctors as private practitioners, it is thus used by the hospital for commercial purposes and not for hospital purposes, and there is no constitutional or statutory authority for exempting such property from taxation. Attorney General Opinion of March 23, 1966. However, if property which is owned by a nonprofit, charitable hospital is partly used for hospital purposes and partly used for commercial purposes, the proviso in subsection (10) and subsection (14) of G. S. 105-296 express the legislative intent that such property will be exempt from taxation pro rata. Attorney General Opinion of March 23, 1966.

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General

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5 May 1971

Subject: Constitutional Law; Retroactive Operation of Constitutional Amendments; Disqualification for Office; Article VI, Section 8, N. C. Constitution.

Requested by: Mr. R. C. Soles, Jr.
N. C. House of Representatives

Question: Would a person who has been convicted in federal court of a felony approximately 20 years ago be disqualified for office or from voting under Article VI, Section 8 of the

North Carolina Constitution which becomes effective on July 1, 1971?

Conclusion: No.

The Attorney General, for a number of years, has construed the present Constitution, Article VI, Section 8, as not disqualifying for office a person who has been convicted in federal court of a felony or as disqualifying such person of the right to vote under Article VI, Section 2, since the language of those two sections made the disqualifying crime one for which punishment would be imprisonment in the State's prison.

Under the new Constitution, it is provided that any person who has been adjudged guilty of treason or any other felony against this State or the United States, or a felony in another state that would also be a felony if it had been committed in this State and who has not been restored to the rights of citizenship in the manner prescribed by law, shall be disqualified from holding office. A similar disqualification of a voter is found in Article IV, Section 2(3).

It is a general rule that constitutional provisions operate prospectively and do not operate retrospectively unless the language or the purpose of the provision indicates that such operation was intended. There is no presumption that a constitution was intended to be retroactive. The same general rules applicable to determining whether a statute is retroactive apply in determining whether the application of a constitutional provision has retroactive application. 16 C.J.S. Constitutional Law, Sec. 40.

Ordinarily a statute will be given prospective effect only and will not be construed to have retroactive effect unless such intent is clearly expressed or arises by necessary implication from its terms. *Strong N. C. Index,* Statutes, Sec.8.

In a broad sense, if the constitutional amendment was construed as imposing a penalty for past acts, it may be considered as an ex post facto law which is prohibited by our Constitution. Therefore we conclude that the provision of the Constitution which will become effective July 1, 1971, should be considered prospective only and will be applicable only to crimes committed against the

federal government or another state after the effective date of our new Constitution.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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10 May 1971

Subject: Courts; District Courts; Juveniles; Probation

Requested by: Mr. Clifton M. Craig
Commissioner
State Department of Social Services

Question: Should children placed on probation by virtue of the juvenile jurisdiction of district courts always be supervised on probation by juvenile probation officers who are under the supervision of a county director of social services or chief counselor for family counselor services, or may they be supervised by a probation officer who is under the supervision of the State Probation Commission and the Commission's Director of Probation?

Conclusion: Children placed on probation by virtue of the juvenile jurisdiction of district courts should always be supervised on probation by juvenile probation officers who are under the supervision of a county director of social services or a chief counselor for family counselor services. Supervision by a probation officer who is under the supervision of a county director of social

services or a chief counselor for faimily counselor services is provided for by G. S. 110-21 and G. S. 7A-286(4) a. G. S. 15-202 excludes "cases within the jurisdiction of the juvenile courts" from the authority given by G. S. 15-202 to the State Probation Commission for the administration of probation in the State.

Robert Morgan, Attorney General
Robert S. Weathers,
Assistant Attorney General

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10 May 1971

Subject: Education; Budget of County and City Boards of Education; Purchase of Catastrophic Accident Insurance

Requested by: Mr. W. F. Womble
Attorney
Winston-Salem/Forsyth County Board of Education

Question: In preparing the budget for a public school, may county and city boards of education include as an object of expenditure funds to purchase catastrophic accident insurance for all or any designated group (such as members of athletic teams) of students?

Conclusion: County and city boards of education may include as an object of expenditure funds to purchase catastrophic accident insurance for all or any designated group of students.

The Winston-Salem/Forsyth County Board of Education contemplates purchasing catastrophic accident insurance for the

students in the public school system. The insurance which has been discussed would have a deductible provision of about $3,000. It would then provide coverage for expenses incurred above $3,000 to a maximum of $25,000 for medical, dental, hospital, and accidental death and dismemberment. You asked whether or not the Board of Education has authority to appropriate public funds for the purchase of such coverage.

G. S. 115-78 deals generally with objects of expenditure for operation of the public schools. Subsection (e) of G. S. 115-78 provides the following:

> "Other objects of expenditure, including educational television, may be included in the school budget when authorized by the General Assembly, the State Board of Education, or county and city boards of education, when funds for the same are made available."

By authority provided for in G. S. 115-78(e), the Winston-Salem/Forsyth County Board of Education may include in the budget, as an object of expenditure, funds for the purchase of catastrophic accident insurance. If funds are made available for this purpose by the Board of County Commissioners, the Board of Education could lawfully appropriate these funds for purchase of this insurance.

Robert Morgan, Attorney General
Andrew A. Vanore, Jr.,
Assistant Attorney General

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10 May 1971

Subject: Business & Commerce; Banks; Savings and Loan Associations; Joint Bank Account; Common Law Incidents; G. S. 41-2.1, G. S. 41-2

Requested by: Mr. W. C. York

Savings and Loan Supervisor
Department of Insurance

Question: Where two brothers entered into express written contracts (contained on signature cards) purporting to create joint "optional savings" passbook accounts in a savings and loan association with the right of survivorship and expressly "not governed by the provisions" of G. S. 41-2.1 in which the passbooks are dated July 9, 1963; August 20, 1963; September 9, 1963; October 26, 1963; September 13, 1969; upon the death of one brother, is the surviving brother entitled to one-half of the balance of each account or is he entitled to receive the total balances of the accounts?

Conclusion: The surviving brother is entitled to receive the total balance of the account after compliance with statutes requiring the banks to withhold "a sufficient portion" to pay taxes, since G. S. 41-2.1 is expressly inapplicable and the signature card contract is sufficient to create survivorship.

The general subject of joint bank accounts with right of survivorship insofar as affected by G. S. 41-2.1 is confused and unclear. Enactment of G. S. 41-2.1 in 1959 and amendments in 1963 have not achieved the clarifying effect which they were intended to accomplish (S.L. 1959, c. 404; S.L. 1963, c. 779). For commentary on the state of the law under G. S. 41-2.1, see Note, 46 N.C.L. Rev. 669 (1968). In 1969, the General Statutes Commission proposed legislation directed toward bringing order into this area of the law. That legislation (Senate Bill 60) died in the Senate on the third reading by a vote of 23 to 25 (1969 General Statutes Commission Biennial Report, Item No. 4; 1969 Regular Session Senate Journal, pages 56, 84, 89, 91, 95).

A necessary preliminary question is whether enactment of G. S. 41-2.1 in 1959 or its rewritten version in 1963 operated so as to preempt the field of law governing joint bank accounts with right of survivorship. Stated another way, did enactment of G. S. 41-2.1 in 1959 or its amendment in 1963 provide that G. S. 41-2.1 shall be the exclusive method for establishing joint bank accounts with right of survivorship? It was not the legislative intent and the bills as enacted do not require that the provisions of G. S. 14-2.1 become the exclusive law on joint bank accounts with right of survivorship. See *Wilson County v. Wooten*, 251 N. C. 667, and *Bowling v. Bowling*, 243 N. C. 515.

In fact, G. S. 41-2.1(d), as enacted in 1959 and as rewritten in 1963, expressly provided:

> "This section shall not be deemed exclusive; deposit accounts not conforming to this section, and other property jointly owned shall be governed by other applicable provisions of the law." (S. L. 1959, c. 404; S. L. 1963, c. 779.)

Professor Robert E. Lee's treatise, "North Carolina Family Law," notes that:

> "The Supreme Court of North Carolina has held that two persons may hold personal property or establish a joint bank account under the terms of a contract that spells out the right of survivorship in the survivor."
>
> * * *
>
> "The rights of creditors in respect to joint tenancies with the right of survivorship, created by an express contract of the parties and not coming within the scope of N. C. Gen. Stat. §41-2.1, are governed by common-law principles.
>
> "At common law, during the existence of a joint tenancy, the undivided interest of a joint tenant may be subjected to the claims of his creditors."

* * *

> "(However, upon death,). . .the survivor takes the entire property free and clear of the claims of creditors of the deceased tenant. This is the rule in North Carolina and, in the absence of statute, has been applied in respect to a joint bank account where the parties had expressly agreed to the right of survivorship." 2 Lee, *N.C. Family Law*, §126, pp. 117-123.

In this case, the contract between the depositors expressly removes the account from the provisions of G. S. 41-2.1. This would be sufficient to bring the contract and the account under the common law.

What is the effect, if any, of G. S. 41-2 on the common law of joint bank accounts?

> "It has been held that N.C. Gen. Stat. § 41-2 does not affect the doctrine of survivorship as it relates to a tenancy by the entirety."

* * *

> "Although N. C. Gen. Stat. §41-2 abolished the doctrine of survivorship as a legal incident to joint tenancy by operation of law, both as to realty and personalty, this statute does not operate to prohibit persons from entering into written contracts as to personalty, so as to make the future rights of the parties depend upon survivorship. In such cases the right of survivorship would seem to arise by virtue of the agreement of the parties and not as an incident of the property law. Its basis is in contract and its existence is subject to contract principles." 2 Lee, *Family Law*, §124, pp. 107-109.

Quoting from Justice Denny in *Wilson v. Ervin*, 227 N. C. 396, 399, the Court said:

> "Moreover, since the abolition of survivorship in joint tenancy, G. S. 41-2, the right of survivorship in personalty, if such right exists, must be pursuant to contract and not by operation of law or statutory provision. *Taylor v. Smith*, 116 N. C. 531."

The *Bowling* case, *supra*, clarified that agreements of husband and wife relating to savings accounts expressly providing that the accounts are to be held by them as joint tenants with the right of survivorship and not as tenants in common would be effective to create the right of survivorship pursuant to contract; and upon the death of the husband, the widow would be entitled to take the whole of the account.

In *Wilson County v. Wooten*, 251 N. C. 667, Judge Denny summarized the law:

> "There seems to be no question about the right of a creditor to levy upon and take the interest of a living tenant in a joint tenancy for the satisfaction of his debts."
>
> * * *
>
> "The survivorship in joint tenancies by operation of law has been abolished in this jurisdiction. G. S. 41-2. However, such a tenancy may be created by contract." Citing *Taylor v. Smith,* 116 N.C. 531; *Jones v. Waldroup*, 217 N.C. 178; *Wilson v. Ervin*, 227 N.C. 396; *Bunting v. Cobb*, 243 N.C. 132; and *Bowling v. Bowling*, 243 N.C. 515.
>
> * * *
>
> "Under common law principles applicable to joint tenancies the survivor takes the entire property, free and clear of the claims of heirs or creditors of the deceased tenant, and the personal representative of such tenant has no right, title or interest therein."

Judge Denny observed in that opinion that the General Assembly

had not enacted any statute with respect to the right of creditors against property held by virtue of a contract creating a joint tenancy with a right of survivorship except as to the right of survivorship in bank deposits created by a written agreement by husband and wife, referring to S.L. 1959, c. 404, codified as G. S. 41-2.1.

Vettori v. Fay, 262 N.C. 481, involved a real property transaction in which the deed of bargain and sale in the granting clause and in the habendum clause purported to create a joint tenancy and constituted a written contract between the parties that the survivor of them would own the land. In a *per curiam* opinion, the Court said:

> "G. S. 41-2 abolished survivorship only where it follows as a legal incident to an existing joint tenancy. Citing *Jones v. Waldroup*, 217 N.C. 178, 187. It does not operate to prohibit persons from entering into written contracts as to lands so as to make future rights of the parties depend upon survivorship. Citing *Bunting v. Cobb*, 243 N.C. 132, 135. A deed, duly signed, sealed and delivered, is an executed contract. Citing *Edwards v. Batts*, 245 N.C. 693."
>
> "As a consequence of the doctrine of survivorship, a joint tenant cannot dispose of his interest by will because, with another joint tenant surviving, he no longer has any interest in the estate on which his will can take effect upon; furthermore, for the same reason, there is no interest which the creditors and heirs of the deceased tenant can reach." 2 Lee, *Family Law*, §124, p. 105.

Hence, the conclusion naturally follows that if the contract expressly creates survivorship rights, as this one does, the surviving joint tenant (brother of the decedent) is entitled to the total balances of the accounts.

Robert Morgan, Attorney General
Sidney S. Eagles, Jr.,
Assistant Attorney General

10 May 1971

Subject: Licenses & Licensing; General Contractors; Licenses

Requested by: Mr. T. R. Boykin, Director
Monroe Dept. of Inspection

Question: Is a builder required to have a general contractor's license to complete the construction of a house, who, after starting construction of a house on a lot owned by the builder, then sells the house for $35,000 plus the value of the lot?

Conclusion: No. The building contractor after entering into a sales contract with a purchaser as a general rule would not convey the real property until the building is completed. A general contractor's license is not required to construct a building on one's own property, although subject to a sales contract. However, the building contractor is required to have a license where he conveys the lot before the completion of the house and the new owner pays the contractor an amount which exceeds $30,000 to complete the construction of the house.

G. S. 87-1 provides in part that general contracting for which a license is required is where one for a price, fee or wage undertakes to bid upon or construct a building or any improvement or structure where the cost of the undertaking is $30,000 or more. This office has in several opinions advised that G. S. 87-1 permits an owner to build on his own property for rental, sale, lease, or for his own occupancy without obtaining a general contractor's license. Ordinarily when a builder, building on speculation, enters into a contract to sell after construction begins, the sale is for the completed structure and there is no conveyance of the real property until the structure is completed. In the usual case where the builder

still owns the property subject to a contract to sell the lot with a house completed in accordance with the plans for a stipulated price, the builder is not required to have a license to complete the house. However, where the contractor conveys the property before the building is complete, the builder is required to have a general contractor's license to complete the house, if the cost to the new owner for the completion of the building is in excess of $30,000.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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10 May 1971

Subject: Municipalities; Streets and Highways; Powell Bill Funds; *TOPICS* Program

Requested by: Mr. James A. Hudson
Salisbury City Attorney

Question: Is a municipality authorized by G. S. 136-41.3 to expend funds allocated to it pursuant to the provisions of G. S. 136-41.1 (Powell Bill funds) for the purpose of financing the engineering study and the preparation of a coordinated improvement plan under the *TOPICS* program?

Conclusion: No. A municipality is not authorized to expend Powell Bill funds allocated under G. S. 136-41.1 for the purpose of financing engineering studies for *TOPICS* improvements programs.

The City of Salisbury has inquired whether it is authorized under G. S. 136-41.3 to use funds allocated to it under G. S. 136-41.1 for the purpose of financing engineering studies and the preparation

of the coordinated street improvement plan under the *TOPICS* program. Powell Bill funds allocated to cities under the provisions of G. S. 136-41.1 may be expended only for the purpose of *maintaining, repairing, constructing, reconstructing* or *widening* of any street within the corporate limits of the municipality or for the purpose of meeting the municipality's proportionate share of assessments levied for such purposes. It is the opinion of this office that such studies and plans do not come within the scope of G. S. 136-41.3 for which Powell Bill funds may be expended.

The *TOPICS* program is a Federal aid urban area traffic operations improvement program authorized by 23 USC 135 for improvements which directly facilitate and control traffic flows, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems and loading and unloading ramps, if such project is based upon a continuing comprehensive planning process. The State Highway Commission in cooperation with municipalities is authorized to carry out the studies required for the improvement projects by G. S. 136-66.2 and it is authorized to carry out the construction of the improvement projects by G. S. 136-66.5.

Policy and Procedure Memorandum 21-18 dated January 17, 1969, issued by the Department of Transportation for the purpose of carrying out 23 USC 135, defines a *TOPICS* plan as "a plan for traffic operations improvements within an area based on comprehensive traffic engineering studies of the arterials within that area." The Policy and Procedure memorandum provides that the plan shall be supported by a study report and shall be coordinated with the continuing long range plan. *The report shall describe existing conditions, discuss methods of analysis and establish the basis for selecting project priorities and recommendations.* It lists numerous items to be inventoried in the study including right of way width, pavement width, roadway type and conditions, traffic control devices, public transportation routes, stops, existing traffic laws, traffic operation practices, traffic capacities, classification of traffic, peak hour, high accident locations and access to commercial airports.

The studies and reports involved in these studies do not include any basic engineering to assist in the actual construction, repairing

or reconstruction of any street. It is the opinion of this office, that the *TOPICS* engineering study does not come within the scope of G. S. 136-41.3 authorizing the expenditure of Powell Bill funds *only* for the purpose of maintaining, repairing, constructing, reconstructing or widening of any street.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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13 May 1971

Subject: Municipalities; Parking; Authority for City of Washington to Contract With Merchants to Provide for Off-Street Parking Facilities

Requested by: Honorable A. Thomas Stewart
Mayor, City of Washington

Question: May the City of Washington enter into a contract with the merchants of the City to remove the parking meters on the City-owned, off-street parking lots upon payment by the merchants to the City of Washington the cost of removing the parking meters and payment yearly of funds to replace funds lost to the city by the removal of the meters.

Conclusion: Yes.

It is our understanding that the City of Washington has been requested by the merchants to remove the parking meters from the off-street parking lots and have agreed to enter into a contract with the City of Washington to pay for the cost of removing the meters and to pay yearly funds to replace funds lost to the City by the removal of the meters, to the end that free parking will be available to the public shopping or visiting in the City.

The operation of off-street parking facilities is a proprietary function (see *Britt v. City of Wilmington*, 236 N. C. 446 (1952)), and the City may, in its proprietary capacity, provide off-street parking facilities provided tax revenues are not used. G. S. 160-200(31) provides that the City may use funds derived from on-street parking meters in connection with the operation of off-street parking facilities.

It is the opinion of this office that the City of Washington may enter into a contract with the merchants providing for the removal of parking meters from City-owned, off-street parking facilities upon payment to the City of funds to replace funds lost to the City by the removal of the meters.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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13 May 1971

Subject: Education; Sale of Property; Authority of Board of Education to Sell and Convey Real Estate to Redevelopment Commission Created Pursuant to Article 37 of Chapter 160 of the General Statutes Without the Necessity of Advertising and Sale of Property at Public Auction

Requested by: Mr. Lowry M. Betts
Sanford City Board of
Education Attorney

Question: May the Sanford City Board of Education sell and convey real property owned by the Board to the Sanford Redevelopment Commission without public notice, advertisement or public bidding?

Conclusion: The Sanford City Board of Education is a public body and pursuant to G. S. 160-469, may dedicate, sell, convey or lease any of its interest in real property to the Sanford Redevelopment Commission without public notice, advertisement or public bidding.

The Sanford Redevelopment Commission (Commission) has offered to purchase from the Sanford City Board of Education (Board) a piece of real estate located within the area in which the Commission is authorized to act. The Commission was created by the City of Sanford pursuant to the provisions of Article 37, Chapter 160 of the General Statutes of North Carolina.

The question was raised whether the Sanford City Board of Education could sell real property owned by the Board to the Commission without public notice, advertisement or public bidding.

G. S. 160-469 states in pertinent part the following:

> "(a) For the purpose of aiding and co-operating in the planning, undertaking or carrying out of a redevelopment project located within the area in which it is authorized to act, any public body may, upon such terms, with or without consideration, as it may determine:
>
> > (1) Dedicate, sell, convey or lease any of its interest in any property, or grant easements, licenses or any other rights or privileges therein to a commission;
> > . . . .
>
> "(b) Any sale, conveyance, or agreement provided for in this section may be made by a public body without public notice, advertisement or public bidding."

If the Board is determined to be a "public body," pursuant to G. S. 160-469, the Board could sell real property to the Commission without public notice, advertisement or public bidding.

Article 37 of Chapter 160 of the General Statutes does not define the term "public body." Our research has failed to uncover any North Carolina appellate court decision specifically defining the term "public body." However, this office has many times in the past held that membership on a county or city board of education is a public office. Furthermore, the Supreme Court of North Carolina has on numerous occasions held that county and city boards of education are administrative agencies of the State in the maintenance and operation of the State public school system. *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733; *State Highway Commission v. Greensboro City Board of Education*, 265 N. C. 35, 143 S. E. 2d 87. Because members of county and city boards of education are deemed public officers, and county and city boards of education are administrative agencies of the State, it would appear that the Sanford City Board of Education is a public body and may sell real property to the Sanford Redevelopment Commission without public notice, advertisement or public bidding.

Robert Morgan, Attorney General
Andrew A. Vanore, Jr.,
Assistant Attorney General

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14 May 1971

Subject: Taxation; Privilege License Tax; Carnivals; License Tax Imposed by County; Exemptions; Uniformity; G. S. 105-39(d); Art. V, N. C. Constitution

Requested by: Mr. James R. Sugg
Craven County Attorney

Question: May a city or county exempt a carnival sponsored by a school from payment of a county license tax while imposing the license tax on other carnivals?

Conclusion: A city or county may not exempt one

carnival from the license tax while taxing other carnivals under G. S. 105-39(d).

A school in Craven County arranges with a person, firm, or corporation engaged in the business of a carnival company to have the carnival operate in the county under the sponsorship of the school. In return for the school's sponsorship, the school receives a percentage of the carnival's profits. The enterprise in question is engaged in the operation of a carnival within the purview of G. S. 105-39. May the county exempt the carnival from the license tax on carnivals, while imposing the license tax on other carnivals within the county? The answer to this question is clearly *NO*.

G. S. 105-39 provides for the levy of a license tax by the State on carnivals. G. S. 105-39(d) provides:

> "Counties, cities and towns may levy a license tax on the business taxed hereunder not in excess of one-half of that levied by the State."

A county may not exempt a carnival held by a private school while imposing the same tax on other carnivals. G. S. 105-39(d) uses the permissive word "may." The significance of the permissive form in the statute is to allow the counties, cities and towns to levy the tax in their discretion. It does not allow them to pick and choose those upon whom the tax will be levied.

Article V of the North Carolina Constitution provides:

> "Every exemption shall be on a Statewide basis and shall be made by general law uniformly applicable in every county, city and town, and other local taxing unit of the State. No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it by this subsection."

"The consititutional requirement of uniformity in taxation applies not only to taxes on property, but also to taxes on trades, professions, franchises and incomes." 7 Strong, *North Carolina Index 2d*, Taxation § 2 (1968) at p. 98. See *Lenoir Finance Co. v. Currie*,

254 N. C. 129 (1961). The counties, cities and towns must decide whether to impose the tax as provided by the General Assembly or not to levy the tax at all. If the counties, cities or towns, were to allow exemptions not provided in the statute, the constitutional rule of uniformity would be violated.

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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17 May 1971

Subject: State Departments, Institutions & Agencies; State Highway Commission; Eminent Domain; Acquisition of Right of Way by State Highway Commission for Utility Lines.

Requested by: Mr. Warner Powell
State Utility Agent
State Highway Commission

Question: Can the State Highway Commission acquire additional right of way solely to accommodate the relocation of utilities?

Conclusion: No. The construction and maintenance of utility lines is not a highway purpose and the State Highway Commission has no authority to condemn for non-highway purposes.

In a letter of April 18, 1971, the State Utility Agent for the State Highway Commission advises that the Commission ordinarily obtains approximately two feet of right of way beyond the sidewalks to accommodate highway construction. He advises that under the Commission's new policy adopted in accordance with standards of the Bureau of Public Roads, utilities are required to locate a

minimum of 6 feet back of the curb, or beyond the sidewalk. As a general rule, 4 feet is required in addition to the 2 feet that is normally acquired for highway construction beyond the sidewalk for the location of power lines. He advised that this new policy is creating a problem for power companies in that the power company is without legal authority to condemn front yards and therefore cannot obtain easements beyond the normal highway right of way necessary for pole lines. G. S. 40-10 prohibits the condemnation by a utility company or, without the consent of the owner, the owner's dwelling house, yard, kitchen, garden or burial ground, unless condemnation of such property is expressly authorized in its charter or by some provision of the code.

The power of eminent domain, unless otherwise provided in the organic law, rests solely in the State unless by legislative action the power is delegated and *the purposes for which it may be exercised enumerated* and the procedure for such exercise prescribed, *Mt. Olive v. Cowan*, 235 N. C. 259 (1952). G. S. 136-19 authorizes the State Highway Commission to *condemn such private property "as it may deem necessary and suitable for road construction, maintenance and repair and the necessary approaches and ways through, and a sufficient amount of land surrounding and adjacent thereto, as it may determine to enable it to properly prosecute the work."* Statutes authorizing the exercise of the power of eminent domain must be strictly construed. *State v. Club Property*, 275 N. C. 328 at page 336; *Griffith v. Railroad*, 191 N. C. 84 at page 89, 29 A CJS Eminent Domain Sec. 22; *Durham & N.R.R. v. Railroad*, 106 N. C. 16 (1890); *Railroad v. Lumber Company*, 132 N. C. 644 (1903); *Board of Education v. Forrest*, 193 N. C. 519 (1927); *Charlotte v. McNeely*, 8 N. C. App. 649 (1970); *Redevelopment Comm. v. Abeyounis*, 1 N. C. App. 270.

The State Highway Commission has been granted exclusive control over the State highway system and may in its discretion authorize the use of highway right of way by telephone or telegraph companies and prescribe the manner and extent of such use, subject to the right of the owner to just compensation. *Hildebrand v. Telephone Company*, 221 N. C. 10 (1942); *Hildebrand v. Telephone Company*, 219 N. C. 402; *Van Leuven v. Motor Lines*, 261 N. C. 539. If it deems it wise or expedient to do so in the interest of the traveling public, the State Highway Commision may

exclude the imposition of any additional easement or burden. *"It may not be held that the Legislature intended thereby to declare that the construction and maintenace of a telephone line is a legitimate highway purpose and embraced within the easement acquired for highway use.* The Commission may exclude others from using any part of the right of way for any permanent or private purpose." *Hildebrand v. Telephone Company*, 219 N. C. 402.

It appears clear from the case law that the location of utilities on the highway right of way is not a highway purpose but they are additional burdens upon the highway right of way for which just compensation must be paid the owner of the underlying fee. See City of *Randleman v. Hinshaw*, 267 N. C. 136 (1966); *Brown v. Asheville Electric Company*, 138 N. C. 533. The fact that the State Highway Commission had discretion to permit the use of the highway right of way for the location of utilities does not make this a highway purpose for which the State Highway Commission is authorized to condemn land not needed for highway construction or repair.

The purpose authorized by G. S. 136-19 for which the Commission may condemn land is for road construction, maintenance, and repair. Under a strict construction of the statute as applied to the facts presented, the construction and maintenance of an electric line on the land proposed to be condemned is not required for road construction, maintenance or repair. The proposed condemnation is not for a purpose enumerated and is not authorized by G. S. 136-19.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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17 May 1971

Subject: Post Judgment Remedies (Civil); Executions; Clerk of Superior Court; Duty of Clerk to Issue Execution under G. S. 1-306 Irrespective of

Rule 62 of Rules of Civil Procedure.

Requested by: Mr. James R. Sugg
Craven County Attorney

Question: Is a judgment creditor entitled *as a matter of right* to have execution issued on a small claim judgment irrespective of Rule 62 of the Rules of Civil Procedure?

Conclusion: Yes. Since there is specific statutory authorization for issuance of execution, Rule 62 of the Rules of Civil Procedure is not applicable.

Several clerks of superior court have declined to issue execution within 10 days of the entering of a small claim judgment, even though requested by the judgment creditor or his attorney. The clerks rely on Rule 62 of the Rules of Civil Procedure, which is, in part, as follows:

> "(a) *Automatic stay; exceptions - injunctions and receiverships.*--Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. . . ."

G. S. 7A-210 defines a small claim as an action where the amount in controversy does not exceed $300.00 and the principal relief sought is monetary or the recovery of specific personal property or summary ejectment, and the action is assigned to a magistrate.

G. S. 7A-225 provides:

> "From the time of docketing, the judgment rendered by a magistrate in a small claim action constitutes a lien and is subject to execution in the manner provided

in chapter 1, article 28, of the General Statutes."

G. S. 1-303 and 1-306 are both a part of Article 28 and provide, in part, as follows:

> "§ 1-303. *Kinds of; signed by clerk; when sealed.*--There are three kinds of execution: one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, and shall be subscribed by the clerk, and when to run out of his county, must be sealed with the seal of his court."
>
> "§ 1-306. *Enforcement as of course.*--The party in whose favor judgment is given, and in case of his death, his personal representatives duly appointed, may *at any time after the entry of judgment* proceed to enforce it by execution, as provided in this article; . . ." *(Emphasis added.)*

Further, Rule 1 of the Rules of Civil Procedure provides:

> "These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature *except when a differing procedure is prescribed by statute.*" *(Emphasis added.)*

The comment of the drafting committee to Rule 1 includes the following statement:

> "In general it can be said that to the extent a specialized procedure has heretofore governed, it will continue to do so."

Therefore, it is the opinion of this office that a small claim judgment of a magistrate is exempt from the provisions of Rule 62.

Robert Morgan, Attorney General
Millard R. Rich, Jr.,
Assistant Attorney General

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20 May 1971

Subject: Public Officers & Employees; Conflict of Interest; Officer Contracting for His Own Benefit; G. S. 14-234; Town Alderman Who is Officer of Corporation.

Requested by: Mr. D. Leon Moore
Mayodan Town Attorney

Question: May a town purchase supplies from a corporation when a member of the town board of commissioners is also mayor pro tem and is part owner, director, secretary and general manager of a store owned by the corporation?

Conclusion: The contract of purchase between the town and the corporation would be utterly void and the member of the board of commissioners who is part owner and an officer of the corporation would be in violation of G. S. 14-234.

In *State v. Williams*, 153 N. C. 595, it was stated that the prohibition of G. S. 14-234 extends to the officer of a corporation in making contracts between the corporation and the city of which he is a commissioner or an alderman although he excused himself as an alderman from voting on the resolution of payment which had been approved and unanimously passed, and whether he had actual knowledge of the making of the contract is immaterial.

G. S. 14-234 has been construed many times by the North Carolina Supreme Court and we quote from *Insulation Co. v. Davidson County*, 243 N. C. 252, wherein the Court wrote as follows:

"The General Assembly is the policy-making agency of our Government, and, in adopting this Act, it made the condemnation of the transactions embraced within the terms thereof a part of the public policy of the State so as to remove from public officials the temptation to take advantage of their official positions to 'feather their own nests' by letting to themselves or to firms or corporations in which they are interested contracts for services, materials, supplies, or the like.

"The statute simply recognizes that 'No man can serve two masters.' Matthew 6:24; *Davidson v. Guilford*, 152 N. C. 436, 67 S. E. 918; *Snipes v. Winston*, 126 N. C. 374.

"'This law was enacted to enforce a well-recognized and salutary principle, both of the moral law and of public policy, that he who is entrusted with the business of others can not be allowed to make such business an object of pecuniary profit to himself.' *State v. Williams*, 153 N. C. 595, 68 S. E. 900.

". . . No man ought to be heard in any court of justice who seeks to reap the benefits of a transaction which is founded on or arises out of criminal misconduct and which is in direct contravention of the public policy of the State. . . .

"Public office is a public trust, and this Court will not countenance the subversion thereof for private gain. Not only will it declare void and unenforceable any contract between a public official, or a board of which he is a member, and himself, or a company in which he is financially interested, whereby he stands to gain by the transaction, but it will also deny recovery on a *quantum meriut* basis. In entering into such contract, a public official acts at his own peril and must suffer the lost incident upon his breach of his public duty. He may look in vain to the courts to aid him in his efforts to recoup his losses, due to the invalidity of the contract, on the grounds the public agency which he serves has been enriched by his misconduct.

". . . To put it simply, the doors of the courts are closed to any individual, or firm in which he is financially interested, who engages in a transaction which comes within the language of the statute. *Snipes v. Winston, supra, Davidson v. Guilford, supra; King v.*

Guilford, 152 N. C. 438; *State v. Williams, supra*. Annos. 84 A.L.R. 969, 110 A.L.R. 164, 154 A.L.R. 375; 12 A.J. 498."

Thus it would not be proper for the Town to trade with the corporation in which the Commissioner has the financial interest.

Robert Morgan, Attorney General
James F. Bullock,
Assistant Attorney General

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20 May 1971

Subject: Criminal Law & Procedure; Drugs; Hallucinogenics; Phencyclidine Hydrochloride (PCP, SERNYL).

Requested by: Mr. Charles Dunn, Director
State Bureau of Investigation

Question: Is the drug known as phencyclidine (HC1) (PCP) a psychedelic or hallucinogens drug within the meaning of G. S. 90-87(9), and thus classified as a narcotic drug under that statute?

Conclusion: Yes.

We quote from a publication of the Federal Bureau of Drug Abuse Control, Micro-Gram, as follows: "'Peace Pill' or 'PCP' is being illicitly sold as a new hallucinogen. It contains phencyclidine HC1, which is marketed as Sernylan by Parke-Davis and Co. as a veterinary prescription drug for use in anesthesia of animals. In certain doses the drug is known to cause delusions and hallucinations in humans."

This drug became a controlled drug under the "DACA" Amendments on April 6, 1969.

Tests reveal that although this drug was an effective anesthetic, it

had side effects which led to its being discontinued for human use. The side effects included agitated, bizarre behavior and disturbances of speech, vision, proprioception and coordination. (*Cohen*, et al, 1962; *Gershon and Olarius*, 1960; *Neubouer*, et al, 1966; *Rosenbaum*, 1959).

Luby, et al, 1962, states: "The psychopathological effects of Sernyl have been described by *Luby*, et al. (22). When given intravenously to control subjects at a dose level of 0.1 mg/kg. the drug produced a predictable series of changes mimicking the primary symptoms of schizophrenia. Initially, alteration of body image occurred with a loss of body boundaries and a profound sense of unreality. Then feelings of estrangement and loneliness ensued, sometimes associated with an intensification of dependency needs and attachment to the observer. Progressive disorganization of thought, inability to maintain a set, loss of goal ideas, impairment of abstract thinking, blocking, neologizing, negativism, and hostility all followed. Some subjects became catatonic and many had dream-like experiences in which they felt as though they were in a different setting at a different time. Genuine hallucinations were not characteristic effects of the drug."

Rosenbaum, et al, writes: "Study of the pathological mechanisms implicated in schizophrenia has recently been accelerated by the production of model psychoses through the use of psychotomimetic drugs. Our labotatories have previously reported psychotomimetic effects with Sernyl, 1-(1-phenylcyclohexyl) piperidine monohydrochloride. This drug is one of a class of new chemical compounds which function as sensory blocking agents, with anesthetic and sedative properties. It was found to produce severe disturbances in body image, affect, attention, and thinking which closely approximated the primary symptoms of schizophrenia. Depresonalization, feelings of isolation and estrangement, concreteness, hypnagogic states, and repetitive motor behavior occurred in patients following intravenous infusion of this drug."

Cohen, et al, 1961, writes: "In a previous report the administration of phencyclidine hydrochloride, a chemical compound with anesthetic and sedative properties, was shown to produce profound disturbances in reaction time, motor learning, and weight discrimination. These findings were obtained with normal subjects

who had been given subanesthetic doses of the drug. The degree and pattern of drug-produced deficits closely approximated those found in a group of chronic schizophrenic patients given the same battery of tests without drugs. These psychotomimetic effects could not be attributed solely to the drug's hallucinogenic or to its sedative properties, since other drugs with each of these properties (lysergic acid diethylamide (LSD-25) and amobarbital sodium) produced neither the degree nor the pattern of deficits demonstrated under phencyclidine hydrochloride."

As Professor Louis S. Harris, Department of Pharmacology, University of North Carolina, recently wrote "There is not much question of the drug's hallucinogenic or psychotomimetic activity."

G. S. 90-87(9) defines narcotic drugs to include mescaline, lysergic acid dictylamide, or other psychedelic drugs or hallucinogens.

From the studies and tests conducted over the past 20 years, it is rather clear that phencyclidine (PCP) is a hallucinogenic or psychotomimetic drug that comes within the meaning of G. S. 90-87(9) as a narcotic and therefore unlawful in North Carolina unless used upon prescription.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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20 May 1971

Subject: Infants and Incompetents; Juveniles; Board of Juvenile Corrections; Conditional Release of Children; Custody Orders; Jurisdiction of the Court Over Children Who Have Been Released From Correctional Institutions

Requested by: Mr. Clifton M. Craig
Commissioner,

State Dept. of Social Services

Questions: (1) Who has legal custody of a child who is 16 years of age, who is on conditional release from a correctional school operated by the Board of Juvenile Corrections, who prior to commitment was found to be a dependent child and whose custody was placed with the director of social services of a county?

(2) Upon release of a child from a correctional school operated by the Board of Juvenile Corrections, who has the responsibility of making placement plans for the child?

(3) In the case of a child who is 16 years of age or older, is a custody order which has been terminated by a commitment of the child to the Board of Juvenile Corrections revived by the release of the child from the custody of the Board of Juvenile Corrections?

Conclusions: (1) The Board of Juvenile Corrections has custody of a child who is 16 years of age, who is on conditional release from a correctional school operated by the Board of Juvenile Corrections, who prior to commitment was found to be a dependent child and whose custody was placed with the director of social services of a county.

(2) Upon release of a child from a correctional school operated by the Board of Juvenile Corrections, the Board of Juvenile Corrections has the responsibility for planning for the return of the child to the community in cooperation with the juvenile probation officer or the family

counselor or such other appropriate personnel as may be availabe.

(3) In the case of a child who is 16 years of age or older, a custody order which has been terminated by a commitment of the child to the Board of Juvenile Corrections is not revived by the release of the child from the custody of the Board of Juvenile Corrections in the absence of a provision in an order of the court providing for such a revival of the custody order. However, the court still has jurisdiction over the child who has been released, any order the judge enters constituting a modification of the order of commitment to the Board of Juvenile Corrections.

Conclusion Number 1 is based upon the fact that in order for a release to be "conditional" there is necessarily a retention of the right to control the person conditionally released.

G. S. 7A-286(4)c specifically provides for planning as described in Conclusion Number 2.

As to Conclusion Number 3, there is no provision of law providing for the revival of a custody order as contemplated by question number 3 in the absence of a provision in an order of the court providing for the revival of the order. The jurisdiction of the court to enter further orders in the case of a child upon his release from a correctional school operated by the Board of Juvenile Corrections is provided for in portions of G. S. 7A-286 as follows:

> "In any case where the court adjudicates the child to be delinquent, undisciplined, dependent or neglected, the jurisdiction of the court to modify any order of disposition made in the case shall continue during the minority of the child or until terminated by order of the court, except as otherwise provided herein, . . ."

G. S. 7A-286(4)c:

". . .If the Board finds that any child committed to its care is not suitable for the program of any facility operated by the Board, or that further court action is needed to protect the best interests of a child *at the end of his term*, the Board shall make a motion in the cause so that the court may enter an appropriate order."

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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25 May 1971

Subject: Motor Vehicles; Equipment and Construction; Length of Pole Trailers

Requested by: Mr. Roger Parker
Assistant Director
License and Theft Division
Department of Motor Vehicles

Questions: (1) G. S. 20-116(e) exempts from the 55 foot vehicle length limitation during daylight hours only vehicles transporting "poles." Would vehicles transporting trees from woods to mill fall within this exemption?

(2) If so, what is the length limitation on such vehicles?

Conclusions: (1) Vehicles transporting trees from woods to mill during daylight hours are entitled to exceed the 55 foot vehicle length limitation.

(2) There does not appear to be any

statutory length limitation upon such vehicles.

Webster's Third New International Dictionary (1961) defines "pole" as "a long comparatively slender usu. cylinderical piece of wood or timber (as the stem of a tree stripped of its branches)." Cut trees thus would fall within the definition of poles and vehicles transporting them are exempt under G. S. 20-116(e) from the 55 foot length limitation during daylight hours. See N.C.A.G. Opinion of 3 February 1969 to Gonzalie Rivers, Director, License and Safety Inspection Division, North Carolina Department of Motor Vehicles, 40 N.C.A.G. 432.

No length limitation with respect to such vehicles appears in the statutes. Common sense would dictate that such haulers use the minimum length possible to avoid hazards of civil liability (See *Ratliff v. Duke Power Co.*, 268 N. C. 605 (1966)) and criminal penalties for violation of other rules of the road due to decreased maneuverability of such vehicles.

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

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25 May 1971

Subject: State Departments, Institutions & Agencies; Housing Corporation; Appropriation; Authority of General Assembly as to Unexpended Appropriation

Requested by: Senator Philip J. Baugh

Question: What authority, if any, does the General Assembly of North Carolina in 1971 have with respect to any portion of a 1969 appropriation in the hands of the North Carolina Housing Corporation which

remains unexpended and unencumbered at this time?

Conclusion: The General Assembly has unlimited authority with respect to funds heretofore appropriated to a State agency but only insofar as the same are unencumbered, unobligated, not placed in trust under conditions conferring rights on beneficiaries or where the State agency may have by any written or oral contract or agreement obligated itself with respect to expenditures of such appropriations.

In a letter dated May 20, 1971, Senator Philip J. Baugh wrote to this office as follows:

> "The 1969 General Assembly created the North Carolina Housing Corporation. At that time an appropriation was made of $500,000. We are studying this in our subcommittee and have been told that these funds are now beyond the control of the General Assembly. Our committee feels that this opinion is not correct and we should like to have in writing from you your opinion as to the status of the portion now in the hands of the Housing Corporation which is unexpended and unencumbered. Specifically, does the General Assembly of 1971 have legislative authority to take any action with respect to such unspent or unencumbered portion of the appropriation as may now remain in the hands of the Corporation?"

It is clear under the provisions of G. S. 122A-2 and 122A-4 that the North Carolina Housing Authority was created by the General Assembly of 1969 as a State agency. The Supreme Court of North Carolina adopted the same conclusion in the case of *Martin v. Housing Corporation*, relating to this State agency, 277 N. C. 29, at 34, where the Court stated, "The Corporation was created as a public agency, an instrumentality of the State of North Carolina, and empowered to act on behalf of the State of North Carolina . . . ."

Further background on the question presented is set forth in an opinion dated 27 October 1970 from the Office of the Attorney General to State Treasurer Edwin Gill in which the following is stated:

> "Chapter 1162 of the Session Laws of 1969 provides as follows:
>
> > 'There is hereby appropriated out of the General Fund of the State to the North Carolina Housing Corporation the sum of five hundred thousand dollars ($500,000.00) for the biennium commencing July 1, 1969, provided such Corporation is created by an Act of the 1969 General Assembly.'
>
> "The quoted language above constitutes the entire text of the act except for the usual general repealing and effective date sections. Later in the 1969 Session, Chapter 1235 (codified as Chapter 122A of the General Statutes) was enacted creating the North Carolina Housing Corporation and setting out in great detail its powers and duties. Particularly pertinent to the question here considered are G. S. 122A-11 and G. S. 122A-18.
>
> "G. S. 122A-11 provides in part as follows:
>
> > '*Notwithstanding any other provisions of law to the contrary*, all moneys received pursuant to the authority of this chapter shall be deemed to be trust funds to be held and applied solely as provided in this chapter.' (*Emphasis added*)
>
> "G. S. 122A-18 provides as follows:
>
> > 'The Corporation is authorized to accept such moneys as may be appropriated from time to time by the General

> Assembly for effectuating its corporate purposes including, without limitation, the payment of the initial expenses of administration and operation and the establishment of a reserve or contingency fund to be available for the payment of the principal of and the interest on any bonds or notes of the Corporation.'"

At this point we have it established that the North Carolina Housing Corporation is a State agency and that the appropriation of the 1969 General Assembly was properly payable to it.

The specific question now before us is the status of unexpended portions of that appropriation. Every State agency, not created by the Constitution, is a creature of the General Assembly. The General Assembly which creates it may destroy it or abolish it. It may modify its powers or functions. It may transfer its functions from one department to another. It may transfer its funds appropriated to it. In this area of government, the authority of the General Assembly is almost absolute.

The General Assembly is, of course, subject to the primary legal consideration that it may not impair the obligation of contracts. Therefore, to the extent that the North Carolina Housing Corporation has made contracts, or made agreements, written or oral, or committed itself in any manner to make expenditures based upon the availability of appropriations from the 1969 General Assembly, then the 1971 General Assembly could not take any action to prevent the Corporation from performing on the basis of its contracts or agreements.

In view of the fact that not all operations of State government are necessarily reduced to a formal contract, written or even oral, it would appear a liberal construction would be desirable to permit an agency, relying on its appropriation, to fulfill the general obligations it has assumed in terms of employment of personnel, performance of other commitments, and carrying on other operations of the agency's business based on its legislative authorization and appropriation therefor.

Most important of all, inasmuch as G. S. 122A-11 states that funds received by the Housing Corporation are "deemed to be trust funds," the General Assembly also would have to determine that any steps it proposed to take with respect to any unspent portion of the appropriation would not infringe upon the rights of any person, firm or corporation which may have arisen as a result of the creation of a trust fund.

Beyond this, the General Assembly would have full authority to withdraw funds not obligated, encumbered, or otherwise committed, however informally, to carrying out its legislative program.

Notwithstanding this authority, great care should be taken in terminating an agency's use of State funds so as to assure that the agency may wind up any of its affairs, which are dependent upon the appropriation, in an orderly manner.

Robert Morgan, Attorney General
Harry W. McGalliard,
Deputy Attorney General

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3 June 1971

Subject: Administration of Estates; Administrator; Necessity of; Disbursement of Funds Held by Clerk of Court Pursuant to G. S. 28-68.2

Requested by: Mr. Martin C. Pannell
Catawba County Attorney

Question: Where an administrator has not been appointed to administer an estate which consists only of monies paid into the clerk of superior court pursuant to G. S. 28-68, and where a creditor of the estate has made demand upon the clerk to have such funds paid in satisfaction of his claim, should the

clerk of court distribute the funds pursuant to G. S. 28-68.2 or should the clerk appoint an administrator to administer the estate and distribute the assets as by law provided?

Conclusion: Decedents' estates are subject to the payment of all lawful claims brought against them prior to any general distribution of assets to heirs at law. Therefore, the clerk of court should appoint an administrator so that the claim filed against the estate may be paid.

G. S. 28-68.2 was not intended to infringe upon or limit the rights of creditors of a decedent's estate to receive payment for any lawful claim against it, pursuant to G. S. 28-105. It must, therefore, be concluded that the authority of the clerk of court to distribute assets pursuant to G. S. 28-68.2 is limited to those cases where there are no known creditors of the estate. In cases where there are known creditors of the estate, the clerk of court must appoint an administrator so that the debts of the estate may be paid in accordance with G. S. 28-105.

Robert Morgan, Attorney General
L. Philip Covington,
Staff Attorney

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3 June 1971

Subject: Social Services; Foster Home Fund; Care in Institutions or Group Care Homes as Constituting Foster Care; G. S. 108-66.

Requested by: Mr. Clifton M. Craig
Commissioner
N. C. Department of Social Services

Question: Do the words "foster homes" include child caring institutions and other homes providing care for groups of children as the words "foster homes" are used in G. S. 108-66 which provides for "assistance to needy children who are placed in foster homes by a county department of social services..."?

Conclusion: The words "foster homes" do include child caring institutions and other homes providing care for groups of children as the words "foster homes" are used in G. S. 108-66 which provides for "assistance to needy children who are placed in foster homes by a county department of social services...."

The conclusion stated above is based upon the definition of the word "foster" appearing in Webster's Seventh New Collegiate Dictionary as follows: "affording, receiving or sharing nurture or parental care though not related by blood or legal ties."

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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3 June 1971

Subject: Housing Authorities; Auto Mileage Allowance for Commissioners and Employees; G. S. 147-8, 147-9, 147-9.1 and 157-5.

Requested by: Mr. O. R. Symons
Executive Director
Elizabeth City Housing Authority

Question: Do G. S. 147-8 and 147-9 place a statutory limitation upon the mileage rate which housing authorities may pay commissioners and employees?

Conclusion: No. G. S. 157-5 and G. S. 147-9.1 are controlling and the mileage allowance is not limited by G. S. 147-8.

G. S. 147-8 and 147-9, enacted in 1931, make it unlawful to pay any officer or employee of the State, or any subdivision thereof, a mileage allowance in excess of 7 cents per mile for the use of a public or private automobile used in the performance of official duties. G. S. 147-8 also repealed any law which permitted a greater mileage allowance.

The Attorney General's Office, for a number of years, has ruled that G. S. 147-8 and 147-9 were applicable to housing authorities notwithstanding the language of G. S. 157-5, which authorized the payment to housing authority commissioners of their necessary travel expenses, and authorized the commissioners to fix the compensation of its officers and employees.

However, in 1967 and 1969, G. S. 147-9.1 was enacted and exempted counties, municipalities, and any board, commission or other agency thereof from the application of G. S. 147-8 and 147-9.

The North Carolina Supreme Court has held in several cases that a housing authority is a municipal corporation, a public agency. *Wells v. Housing Authority*, 213 N. C. 744; *Cox v. Kinston*, 217 N. C. 391; *Mallard v. Housing Authority*, 221 N. C. 334.

Thus, using the word "municipality" in its broader sense, as did the Court, we conclude that G. S. 147-9.1 exempts housing authorities from the application of G. S. 147-8 and 147-9. G. S. 147-9.1 reads:

> "Nothing in this article shall be deemed to be applicable to counties or municipalites or to limit or restrict the amount of any automobile mileage allowance, or automobile expense allowance, or any

other travel expense allowance or payment which may be paid by a county or municipality or by any board, commission, or other agency of any county or municipality."

Prior opinions of this office in conflict with the view expressed herein are hereby modified or superseded to the extent of such conflict.

Robert Morgan, Attorney General
James F. Bullock,
Deputy Attorney General

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3 June 1971

Subject: Taxation; Ad Valorem; Exemptions; Orphanages and Other Similar Homes; Sailors' Snug Harbor; G. S. 105-296(5), (7); G. S. 105-297(5), (7).

Requested by: Representative McNeil Smith
Greensboro, North Carolina

Question: Would real and personal property belonging to a charitable corporation whose purpose is to maintain a home for aged and infirm sailors be exempt from ad valorem taxation as an "orphanage or other similar home"?

Conclusion: Real property belonging to and actually and exclusively occupied by a charitable corporation maintaining a home for aged and infirm sailors thereon, and personal property belonging to such as institution, would be exempt from ad valorem taxation as property of an "orphanage or other similar home", if such property is used entirely and completely for charitable purposes.

The Trustees of the Sailors' Snug Harbor in the City of New York were incorporated as a charitable corporation by the New York Legislature on 6 February 1806, for the purpose of carrying out dispositions made by the Will of Robert Richard Randall. In his will, Mr. Randall left his entire residuary estate to certain Trustees for the purpose of erecting upon land owned by the testator an asylum or marine hospital "for the purpose of maintaining and supporting aged, decrepit and worn-out sailors" and to be known as the "Sailors' Snug Harbor". The Harbor was established on Staten Island sometime between 1828 and 1833 and it has operated continuously there since that time. This venerable institution is now contemplating moving to North Carolina, and inquiry has been made whether real property upon which the facility might be built, and personal property used in connection therewith, would be exempt from ad valorem taxation in this State.

The pertinent sections of the Machinery Act appear to be G. S. 105-296(5) and 105-297(5). G. S. 105-296(5) provides exemption for "real property belonging to, actually and exclusively occupied by . . . orphanages, or other similar homes . . . not conducted for profit, but entirely and completely as charitable." G. S. 105-297(5) exempts "personal property belonging to . . . orphan and other similar homes . . . which are not conducted for profit and entirely and completely used for charitable and benevolent purposes."

Whether the property of Sailors' Snug Harbor will be exempt will depend upon:

(1) whether its real property will be "actually and exclusively occupied";

(2) whether it will be conducted "entirely and completely as charitable"; and

(3) whether an "asylum or marine hospital for the purpose of maintaining and supporting aged, decrepit and worn-out sailors" may be considered to be an "orphanage or other similar home".

We will engage in the assumption, for the purpose of this inquiry,

that the institution will "actually and exclusively occupy" its realty. If it does not, then no exemption will attach to it. We will further assume that its operation will be "entirely and completely charitable", and we observe in that regard that the Internal Revenue Service has determined it to be charitable, at least to the extent that contributions to it are deductible under § 170 of the Internal Revenue Code for income tax purposes. *Cumulative List of Organizations*, IRS Publication 78 (Rev. 12-68).

That brings us to a consideration of whether the Sailors' Snug Harbor may be equated to an "orphanage or othr similar home". We find that it can be. Webster defines "orphanage" to be "an institution for the care of orphans or homeless children; and orphan asylum". *Webster's Third New International Dictionary.*

An "orphan asylum" is essentially a refuge for orphan children, intrinsically a home for the care of dependent, neglected and often indigent children. *County Bank and Trust Company v. Neeld*, 32 N.J. Super. 124, 108 A 2d 28, 31.

An "asylum" is an institution for the protection or relief of some class of destitute, afflicted or otherwise unfortunate persons. *Webster's Third New International Dictionary.*

It would seem from the foregoing that the characteristic that binds an "orphanage" to "other similar homes" is that of providing asylum, refuge and sanctuary to any class of destitute, afflicted or otherwise unfortunate persons. In this sense, Sailors' Snug Harbor, which was created as an "asylum or marine hospital for the purpose of maintaining and supporting aged, decrepit and worn-out sailors" would fall within the exemption provided.

Since Sailors' Snug Harbor is a foreign charitable institution, the exemption provisions of G. S. 105-296(5) and 105-297(5) are made applicable through G. S. 105-296(7) and 105-297(7).

Robert Morgan, Attorney General
Myron C. Banks,
Assistant Attorney General

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3 June 1971

Subject: Marriage and Divorce; Minors; Consent by a Director of Social Services to Marriage of 16 Year-Old Pregnant Female; Residence of Minor to be Married

Requested by: Mr. E. C. Modlin, Director
Wilson County Department of
Social Services

Question: A pregnant female, who is 16 years old, and the 19 year-old putative father are in a county of North Carolina. The putative father is staying with his relatives in the county, is seeking employment in the county, and has stated that he intends to reside in the county. The 16 year-old female and the putative father desire to marry each other and they have come to the county from another state where the parents of the female and the putative father reside. Is it lawful for the director of social services to give consent for the female to marry so that the register of deeds may issue a marriage license to the female and the putative father?

Conclusion: Yes.

Under the circumstances described in the question, the "director of public welfare" (now director of social services) is authorized by G. S. 51-2 to give consent for the marriage of the 16 year-old female. Whether or not the putative father is a "resident" of the county in the strictest possible sense of the word "resident", it appears under the circumstances described that he is a resident of the county within the meaning of the provision in G. S. 51-2 that consent may be given by the "director of public welfare of the county of residence of either party." It is thought that the reference to residence in G. S. 51-2 is merely for the purpose of designating which of many directors of social services shall perform the duty of giving or withholding consent to the proposed marriage rather than for the purpose of requiring "residence" in its strictest possible

sense as distinguished from such "residence" as one sojourning in a county may be said to have. It is thought that it is not the intent of G. S. 51-2 to make any distinction between the case of the proposed marriage of a man who is *21 years old* to a 16 year-old girl and the case of the proposed marriage of a *19 year-old* male to a 16 year-old girl, and nothing in G. S. 51-2 requires that a male who is 21 years of age be considered a resident of the state where his parents live for the purpose of procuring consent for the marriage of the 16 year-old female. In general, at least, G. S. 51-2 treats a 19 year-old male as an adult for the purpose of marriage, and it seems inconsistent to suggest that he is to be treated under all circumstances as a child in determining his place of residence for the purposes of G. S. 51-2.

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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3 June 1971

Subject: Streets and Highways; Municipalities; Powell Bill Funds; Expenditure for Fire Station Approaches and Sidewalks

Requested by: Honorable Amy W. Lupton, Mayor
Town of Oriental

Question: May Powell Bill funds be used for the purpose of reworking the sidewalk for an approach to a fire station?

Conclusion: No. The expenditure for this purpose is not a use enumerated under G. S. 136-41.3 and the use of the funds for sidewalk purposes is specifically prohibited by G. S. 136-66.1.

G. S. 136-41.3 provides that Powell Bill funds shall be expended by cities and towns *only* for the purpose of maintaining, repairing,

constructing, reconstructing or widening of any street or public thoroughfare including bridges, drainage, curb and gutter, and other necessary appurtenances. The proposed expenditure of funds for reworking a sidewalk for the approaches to the fire station is not for the purpose of maintaining, repair and constructing, reconstructing or widening of a street, nor does it appear that the proposed construction is a necessary appurtenant, as a bridge, drainage, curb and guttering. Therefore, the use of the Powell Bill funds for the purpose of reworking the sidewalk for the approaches to the fire station is not a permissible use. Your attention is also directed to G. S. 136-66.1(4) d. which specifically prohibits the use of Powell Bill funds for sidewalk purposes.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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3 June 1971

Subject: Counties; Contracts; Bidding, Changes in Plans After

Requested by: Mr. William B. Howe
Henderson County Attorney

Question: May the board of county commissioners negotiate with the low bidder for a reduction in the contract price based upon certain minor changes in the base contract, after bids are received?

Conclusion: No. The board of county commissioners should not make changes in the terms of the proposed contract after bids are received in the absence of showing that the changes are immaterial and such changes would not have affected the outcome of

the bidding.

According to a letter of May 6, 1971, from the county attorney for Henderson County, the county commissioners have received bids for a county office building and now desire to negotiate with the low bidder for a reduction in the contract price, "based upon certain minor changes in the base bid". The bids of the two low bidders are as follows:

Bidder	Base Bid	Alternatives	Total
No. 1	$149,423	$3,176	$152,599
No. 2	$149,890	$2,648	$152,538

Bidder No. 1 was low by $467 on the base bid but Bidder No. 2 was low on the total including the base bid and the alternatives by $61.

The changes proposed to be made include increasing the height of the foundation. This change would also decrease the amount of excavation and would result in a decrease in the total contract amount by approximately $1,800. The Board also proposes to change the plans to include in the contract the finishing of a portion of the basement where the plans advertised called for an unfinished basement. The total contract price would reflect a decrease of approximately $150 in the total bid price by Bidder No. 2 as a result of these changes. G. S. 143-129 provides for the award of construction contracts by counties and it requires that the award be made to the lowest responsible bidder after public advertising.

The general rule is that public officers have no authority to make or allow material or substantial changes in any of the terms of the proposed contract after bids are in. 43 Am. Jur., Public Works and Contracts, Sec. 46; Annotation, 65 ALR 835, Public Contracts; 19 RCL 1070; Vol. 4, Antieau, County Law, Sec. 39.08, page 232; 3 Yokley, Municipal Corporations, Sec. 442, Note 136; 10 McQuillin, Municipal Corporations, Sec. 29.72, page 416. To permit material or substantial changes in the terms of the contract would prevent real competition and could lead to a favoritism and fraud which the competitive bidding statutes are designed to prevent.

Statutory provisions providing for the award to the lowest responsible bidder by advertisment should be strictly construed as changes in specifications after bidding could emasculate the whole system of competitive bidding. The Board should not negotiate with the bidder in the absence of a showing that the items being changed are immaterial and could have no effect on the outcome of the bidding. It is observed that Bidder No. 1 was low on the base bid by $467 while after including the alternatives, Bidder No. 2 was low by only $61 on a total bid of $152,538. I do not believe the changes proposed are immaterial in this case. The changes proposed could have resulted in a different low bidder had they been made prior to the bidding. I am of the opinion that in order to secure fair competition upon equal terms to all bidders, a contract with the proposed changes should be entered into only after being duly advertised.

Robert Morgan, Attorney General
Eugene A. Smith,
Assistant Attorney General

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11 June 1971

Subject: State Departments, Institutions & Agencies; Public Contracts; Competitive Bidding; Conditional Bids

Requested by: Mr. Carroll L. Mann, Jr.
State Property Control and
Construction Officer
Department of Administration

Question: What consideration should be given to a bidder's bids on two sections of work, one bid containing a condition that the award of one section without the other would not be accepted, where the bidder is not lowest on both sections and the public construction project is advertised and proposals requested on ten sections with no

provision for combination bidding?

Conclusion: None. The bids were not responsive and in effect a counterproposal. The bid which was not lowest should not be considered for the reason that G. S. 143-129 requires the award of the contract to the lowest responsible bidder, and the bid which was lowest should not be considered by reason of the bidder's request written on the bid. Competitive bidding requires all bidders to be given an opportunity to bid upon the same basis, that is, upon the same plans and specifications, under the same terms and conditions, and the acceptance of the conditional bids would be a favoritism or advantage not enjoyed by all bidders.

In a letter from Mr. Carroll L. Mann, Jr., State Property Control and Construction Officer, with various enclosures, the following facts are revealed: Appalachian State University, under supervision of the Department of Administration, recently advertised and received bids for a project to expand its campus water system. The project was divided into ten sections of work and bids requested separately on each section. One bidder submitted proposals on Section III, General Contract Structures, and on Section IV, Mechanical Contract, but conditioned or qualified his bid by writing on the bottom of his proposal on Section IV as follows: "In connection with our proposals for Sections III and IV, we will not accept award of one section without the other." The bidder was lowest on Section IV, the Mechanical Contract, but higher than two other bidders on Section III, General Contract Structures. However, the conditional bids combined would be lower than the combined bids of the lowest bidder on Section III and the second lowest bidder on Section IV. The advertisement, instructions, and contract documents provide that bids will be accepted on the ten sections of work. The contract documents are silent on combination bidding, but there is no provision for combination bidding in the proposal form. Each proposal provided that the bidder would contract to do that particular section of work for which the proposal was submitted. The instructions to bidders contain in part the following:

"Proposals to be entitled to consideration must be in accordance with the following instructions:

1. Proposals:

Proposals must be made in strict accordance with the 'form of proposals' provided therefor, ..."

The conditional bid was not responsive to the instructions to bidders and was in effect a counterproposal or a new proposition.

On Section III, General Contract Structures, the bidder's bid was not lowest and should not be considered by reason of G. S. 143-129 which requires the award of the contract to the lowest responsible bidder. On Section IV, Mechanical Contract, the bidder's bid was lowest, but conditioned upon the award of both contracts, Section III and IV, and should not be considered by reason of the bidder's request as written on the proposal.

Treating the bids as a combination bid, not requested or provided for, the bids could not be considered for the reason that all prospective bidders should be placed upon the same equal competitive level, and the acceptance of the conditional bids would be a favoritism or advantage not enjoyed by all bidders. In competitive bidding it is essential that all bidders be given an opportunity to bid on the same thing under the same terms and conditions. See 43 Am. Jur., *Public Works and Contracts*, secs. 40 and 46; 40 C. J. S., *Highways*, sec. 208, p. 95; 10 McQuillin, *Municipal Corporations*, Third Ed., secs. 29.65 and 29.72.

In *State ex rel. Grosvold v. Board of Sup'rs of Eau Claire County, et al*, 263 Wis. 518, 58 N. W. 2d 70 (1953), it was held that a county could not accept a combination bid where explicit instructions required submission of separate bids as to the heating and plumbing. The fact that the architect advised plaintiff that combination bidding was permissible was of no effect, since other bidders had a right to rely on the bidding instructions. Further, the fact that the plaintiff was the lowest bidder was of no effect, since other bidders may have submitted a lower combined bid than plaintiff if allowed to so bid. Concerning the bidding terms the court

said:

> "...Therefore, the reference in the foregoing quotation from the decision in that case to change of 'terms' has particular reference to change in contract terms and not in bidding terms, but nevertheless by analogy the reason advanced against change in terms of the contract would apply with equal force to change in the bidding terms made known to but one bidder or effected after the bids were received and opened in order to qualify a bid which otherwise would have been ineligible. As pointed out in the decision of the Chippewa Bridge Co. case, there must be a common standard by which to measure all the bids, and without that there is not present the necessary element of equal opportunity afforded to all bidders to bid on the same basis which is implied in the statutory requirement of letting the work 'to the lowest *** responsible bidder.'"

In *Donald S. Hubsch Co. v. Sullivan*, 47 N. J. 556, 222 A. 2d 12 (1966), proposals were being invited for moving the Department of Agriculture and the Department of Health. The bid proposal forms made attendance mandatory at a pre-bid briefing, and according to the Director of Purchase and Property, it was orally announced that the Director reserved the right to award a combined contract for the two moves. After bids were received the Department decided to award the contracts to one bidder. The award of the contract on a combination basis was upheld, but the court stated that such an important matter as combination bidding should not be left to oral announcement at a pre-bid meeting, but should be set forth explicitly in bid proposal documents or specifications, that certainty and fairness would be assured in that way and that all prospective bidders would be placed on the same equal competitive level. This would avoid a possibility of preference, and equality among bidders might become illusory and the advantages of competition lost to the public if not so followed.

The contract documents and G. S. 143-129 reserve the right to reject any or all proposals.

From the foregoing authorities and for the reasons hereinbefore set forth, it is concluded that the bids in question should not be considered.

Robert Morgan, Attorney General
William B. Ray,
Assistant Attorney General

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15 June 1971

Subject: Workmen's Compensation Act

Requested by: Honorable Gilbert H. Burnett
Chief District Court Judge
5th Judicial District

Question: What is the liability of the State to a defendant in cases where persons who have been convicted of certain criminal offenses are given suspended sentences or placed on probation with conditions being imposed upon them, and the defendant sustains injuries while performing the conditions imposed?

Conclusion: The State of North Carolina would not be liable for any injuries to these persons which occur while the persons are performing the conditions of their suspended sentence or probation.

Judges in the District Court of the 5th Judicial District have been following the practice of giving suspended sentences in certain cases upon the condition that the defendant perform certain duties, i.e., in the case of a person convicted of littering the highway the fine is remitted on the condition that the defendant spend a day picking up trash along the highway or in some public area. Juveniles are placed on probation and are required to perform certain duties in

connection with the probation such as to do certain work around a school where they had been responsible for causing damage to the school. The members of the District Court of the 5th Judicial District have asked for an opinion regarding the liability of the State of North Carolina in cases such as those described above where the defendant is injured.

The Workmen's Compensation Act, G. S. 97-1 et. seq., governs the payment of compensation to employees who are injured in the course and scope of their employment and whose injuries arise out of their employment. An "employee" is defined in G. S. 97-2 (2) as follows:

> "The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the State, the term 'employee' shall include all officers and employers of the State, except only such as are elected by the people, or by the General Assembly, or appointed by the Governor to serve on a per diem, part time or fee basis, either with or without the confirmation of the Senate; . . . ."

Clearly, persons who are convicted of criminal offenses and are given suspended sentences or placed on probation cannot come within the provisions cited. They are not employed by appointment or contract of hire.

The only provision of G. S. 97-1 et. seq. which could have any bearing on these persons is G. S. 97-13(c). This section deals with injuries to prisoners while confined within the penal system. G. S. 97-13(c) reads, in part, as follows:

> "(c) Prisoners.–This article shall not apply to prisoners being worked by the State or any subdivision thereof, except to the following extent: Whenever any prisoner

assigned to the State Department of Correction shall suffer accidental injury arising out of and in the course of the employment to which he had been assigned, if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this article, then such discharged prisoner may have the benefit of this article by applying to the Industrial Commission as any other employee; . . . ."

The provisions of this article would not apply to persons in the situation we are discussing herein since they are not assigned to the State Department of Correction. The first portion of G. S. 97-13(c) excludes all other prisoners from the coverage of the article. Persons who are placed on probation or who receive suspended sentences are not prisoners and are not in anyone's custody.

Therefore, if one of these persons is injured while performing one of the conditions of his suspended sentence or probation and the injury is caused by the negligence of a third party, i.e. by a motorist, the injured party would only have recourse against the third party. The State is immune from a suit against it by the injured party unless the negligent party causing the injury is a State employee, in which case the State would be liable to the extent provided in G. S. 143-291, et. seq., the North Carolina Tort Claims Act. No workmen's compensation benefits at all would be available to these persons.

Robert Morgan, Attorney General
William Lewis Sauls,
Staff Attorney

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15 June 1971

Subject: State Departments, Institutions & Agencies; Mental Health; State Hospitals Authority of Department of Mental Health

to Issue Licenses to Hospitals Which it Operates.

Requested by: Dr. Eugene A. Hargrove
Commissioner
N. C. Department of Mental Health

Question: Does the Department of Mental Health have authority to issue licenses to institutions operated by it indicating that such institutions are psychiatric hospitals for the treatment of alcoholism?

Conclusion: Yes.

Black's Law Dictionary, 4th ed., defines the word "license" as "authority, permission or liberty given to do or forbear any act." In regard to governmentally controlled activities, such "license" or authority may be given only by the sovereign or a designee of the sovereign. In North Carolina the operation of institutions which provide medical and psychiatric services is a governmentally controlled activity, and such institutions cannot be operated absent the sovereign's authorization to do so. In this sense of the word the legislative "license" or authority for the establishment and operation of state institutions for the medical and psychiatric treatment of alcoholism is given to the Department of Mental Health. (G. S. 122-1; G. S. 122-7.1) Thus all alcoholic rehabilitation centers operated by the Department of Mental Health are automatically "licensed" by the Department immediately upon their establishment.

The more popularly understood definition of the term "license" is the physical document or certificate which serves as evidence that the license or authority to engage in an activity has been granted. Absence of such a certificate in no way impeaches or diminishes the authority of the license. Rather, it merely makes it more difficult to prove the existence of the authority. Thus, to avoid this inconvenience, a certificate of license is usually issued by the licensing authority. If the Department of Mental Health finds it expedient to do so, it certainly has authority to issue such a certificate of license to the state instituions which it operates.

Robert Morgan, Attorney General
L. Philip Covington,
Staff Attorney

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15 June 1971

Subject: Taxation; Hospital Districts; Levy for Operating Expenses; Year of Levy; Construction of Ballot; G. S. 131-126.38.

Requested by: Mr. Rom B. Parker
Halifax County Attorney

Question: Where a levy of a special tax for the payment of operating expenses of a hospital is approved by voters of a hospital district in an election held pursuant to G. S. 131-126.38 under a ballot providing that the tax shall be levied during the first two years that said hospital is in operation, may the county commissioners of the county wherein the district is located levy the tax for the taxable year beginning July 1, 1971, when the hospital will commence operation in the last months of the fiscal year?

Conclusion: Where a levy of a special tax for the payment of operating expenses of a hospital is approved by voters of a hospital district in an election held pursuant to G. S. 131-126.38 under a ballot providing that the tax shall be levied during the first two years that said hospital is in operation, the county commissioners of the county wherein the district is located may levy the tax for the taxable year beginning July 1, 1971, when the hospital will commence operation in the last months of

the fiscal year.

G. S. 131-126.38 authorizes the county commissioners of the county in which the hospital is located to levy a tax for the purpose of financing the cost of operation provided the levy is approved by a majority of those voting in an election of the qualified voters who reside in the hospital district. The ballot in the case at hand contained the following language:

> "...(S)hall the Board of Commissioners...be authorized to levy a special tax during the first two (2) years that said hospital is in operation..."

May the county levy the tax for the fiscal year in which the hospital begins operation even though the hospital will be in operation only a few months during that fiscal year? The answer is obviously "yes". The county was authorized to levy the tax to pay for the first two years of operation. The county should levy the tax to pay for the operation of the hospital in the fiscal year in which the expenses are incurred. This conclusion is in harmony with the purpose of Article 13B of Chapter 131 as set out in G. S. 131-126.19, this express purpose being relevant to hospital districts in accordance with G. S. 131-126.18(4).

Robert Morgan, Attorney General
I. Beverly Lake, Jr.,
Assistant Attorney General
Ronald M. Price,
Staff Attorney

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15 June 1971

Subject: State Departments, Institutions & Agencies; Industrial Commission; Contempt Powers; Deputy Commissioners

Requested by: Mr. William H. Stephenson
Commissioner

N. C. Industrial Commission

Question: Do the deputy commisioners of the Industrial Commission have power to punish for contempt in workmen's compensation cases?

Conclusion: The deputy commissioners of the Industrial Commission have contempt powers in workmen's compensation cases.

G. S. 97-79(b), contained in the Workmen's Compensation Act, indicates as to the power of the Industrial Commission:

> "(b) The Commission may appoint *deputies who shall have the same power to* issue subpoenas, administer oaths, *conduct hearings*, take evidence, *and enter orders*, opinions, and awards based thereon *as is possessed by the members of the Commission*, and the compensation of such deputy or deputies shall be fixed by the Commission." (*Emphasis added.*)

G. S. 5-6, indicating who has power to punish for contempt, provides:

> "§ 5-6. *Courts and officers empowered to punish.* - Every justice of the peace, referee, commissioner, judge of a court inferior to the superior court, magistrate, or judge, justice, or clerk of the General Court of Justice, or member of the board of commissioners of each county, or member of the Utilities Commission *or Industrial Commission*, has the power to punish for contempt while sitting for the trial of causes or while engaged in official duties." (*Emphasis added.*)
>
> (G. S. 5-6 was amended by Chapter 381 of the 1971 Session Laws, effective October 1, 1971, by deleting justices of the peace and judges of courts inferior to the superior court from its provisions.)

Although G. S. 5-6 specifically gives the power of contempt to members of the Industrial Commission, the provisions of G. S. 97-79(b) extend to deputy commissioners in holding hearings the powers possessed by members of the Industrial Commission. Since the contempt power is a necessary concomitant to the maintaining of order in connection with hearings, it is the opinion of this Office that the contempt power would necessarily go with the hearing officers, whether commissioners or deputy commissioners, when they are holding hearings.

It is to be noted that G. S. 143-296 provides:

> "The members of the Industrial Commission, or a deputy thereof, shall have power to issue subpoenas, administer oaths, conduct hearings, take evidence, enter orders, opinions, and awards based thereon, and punish for contempt."

That sentence, although contained in the Tort Claims Act provisions, does not restrict itself specifically to the Industrial Commission in connection with tort claims. Therefore, it certainly can be argued that that authority is extended to the commissioners and deputy commissioners while holding hearings in both workmen's compensation and tort claims.

Whatever the authority, however, we are of the opinion that deputy commissioners have authority to punish for contempt in both workmen's compensation and tort claim matters.

Robert Morgan, Attorney General
(Mrs.) Christine Y. Denson,
Assistant Attorney General

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16 June 1971

Subject: Courts; Judges; Duty to Respond to Subpoena Ad Testificandum

Requested by: Honorable Charles T. Kivett
Judge of the Superior Court

Question: If it becomes necessary during the trial of a criminal prosecution, can a judge of the Superior Court through the issuance of a subpoena ad testificandum require the presence at the trial of a judge of the District Court?

Conclusion: If it becomes necessary during the course of a criminal prosecution, the presence of a judge of the District Court may be required through the issuance of a subpoena ad testificandum.

A studied review of the applicable statutory and case law fails to reveal a judicial exemption from the explicit requirements of Article 8 of Chapter 8 of the General Statutes of North Carolina.

In *In Re W. W. Pierce*, 163 N. C. 247, 79 S. E. 507 (1913), Chief Justice Clark, in considering an attorney's claimed exemption from subpoena, observed:

> "'Equality before the law' is a fundamental principle of our system of government. The law is no respector of persons. While in one sense a lawyer is an officer of the court, that simply means that in the discharge of his duties he is subject to its control and discipline. But this does not excuse him from obedience to legal precepts to which he owes exactly the same respect and obedience as any other citizen. . . ."

The non-availability of judicial immunity to subpoena is illustrated by G. S. 8-83 which reads, in pertinent part, as follows:

> "*When deposition may be read on the trial.* - Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:
>
> * * *

(7) If the witness is a justice of the Supreme Court, judge of the Court of Appeals, or a judge, presiding officer, clerk or solicitor of any court of record, and the trial shall take place during the term of such court."

Although G. S. 8-83 does not expressly announce that members of the judiciary are liable to subpoena, this inference appears from the requirements set forth for the introduction into evidence of a judge's deposition. The converse of G. S. 8-83(7), that the deposition of a judge is not admissible when he is not holding a term of court, clearly illustrates the conclusion that the Legislature did not intend to extend to the judiciary immunity from subpoena. (As to the special rules pertaining to depositions in criminal matters, see G. S. 8-74).

Finally, any claim of immunity in criminal prosecutions must fall in light of the Sixth Amendment to the Constitution of the United States, which grants the accused the right to "...have compulsory process for obtaining witnesses in his favor..." Therefore, any claim of immunity would fail since it would deprive the accused of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

Robert Morgan, Attorney General
Jacob L. Safron,
Assistant Attorney General

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17 June 1971

Subject: Municipalities; Police; Public Records

Requested by: Mr. Samuel M. Moore
Greensboro Asst. City Attorney

Questions: (1) Are police departments required to maintain arrest records and records showing the disposition of a charge upon which one was arrested?

(2) Whether or not there is a requirement that such records be kept, if such records are in fact kept, would they be considered public records and, therefore, subject to inspection?

(3) Whether or not such records are required to be kept, if they are in fact kept, is there any obligation upon the custodian to see that they accurately reflect the matters they purport to record?

Conclusions: (1) There is no statutory requirement that either arrest records or disposition records be maintained by municipal police departments or county sheriff departments.

(2) In the event that arrest records or disposition records are maintained, they would be "public records" as defined by G. S. 132-1 and, therefore, subject to examination by the general public at reasonable times.

(3) In the event arrest or disposition records are in fact kept, the custodian of such records is under an obligation imposed by common law to see that the records accurately reflect the facts they purport to record.

G. S. 132-1 defines public records as being all written or printed books, papers, letters, or documents and maps made and received in pursuance of law by the public offices of the State, its counties, municipalities, and other subdivisions of government in the transaction of public business. Further provisions of Chapter 132 require that the custodian of such records must permit them to be inspected and examined at reasonable times and must furnish certified copies upon the payment of fees as prescribed by law.

Although there is no statute requiring municipal police or other constabulary to maintain arrest records or disposition records, it is the opinion of this office that in the event such records are maintained, they would be papers made in pursuance of law in the

transaction of public business, thus falling under the definition of public records. Furthermore, the common law imposes upon the custodian of public records the obligation to see that they speak the truth. Therefore, if the election is made to maintain records of arrest or disposition, they must be maintained in such a manner as to reflect the true status of an individual case.

It should be emphasized that an election may be made to keep arrest records only, disposition records only, neither or both. The obligation to maintain them accurately is imposed only in regard to those records which are in fact kept. Thus, if only arrest records were maintained, there would be no requirement for such record to show the judicial disposition of the case. However, if any notation showing judicial disposition is made, this would constitute a "disposition record" thus making applicable the requirement that the record accurately reflect the final judicial disposition of the case. It should also be noted that absent bad faith or willfulness the record custodian would not be subject to any civil or criminal action for keeping an inaccurate record other than an order requiring him to change the record to make it speak the truth.

Robert Morgan, Attorney General
L. Philip Covington,
Staff Attorney

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23 June 1971

Subject: Prisons and Prisoners; Medical Treatment to Inmates Without Their Consent

Requested by: Mr. Martin R. Peterson
Director of Legal Services
N. C. Department of Correction

Question: May an inmate be given injections of insulin or another drug, when he so refuses, if this is necessary in the opinion of the doctor to protect the health or save the

life of the inmate?

Conclusion: The Department of Correction may give a refusing inmate injections of insulin or another drug when it is necessary in the opinion of the doctor to protect the health or save the life of the inmate.

By previous opinions in 1962 and 1968, which are attached hereto, this office held it was valid to force-feed prisoners. When it is necessary to protect the inmate's health, the Department of Correction may similarly give injections of a drug deemed necessary in the doctor's opinion to protect the inmate's health or save his life.

Prison officials are responsible for the health of prisoners in their custody. Also, a prisoner is entitled to reasonable medical care. It is the opinion of this office that it would be the duty of prison officials to force-feed or give necessary drugs to inmates who refuse to eat or take the injections.

In line with our previous opinions such injections should not be given until it is determined that the failure to do so will cause injury to the inmate's health or possibly cause death. Force-feeding or required injections should be performed under the very best conditions possible, and a detailed written report should be made a permanent part of the inmate's medical record.

Robert Morgan, Attorney General
Edward L. Eatman, Jr.,
Staff Attorney

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23 June 1971

Subject: Courts; District Courts; Juvenile Jurisdiction

Requested by: Mr. Clifton M. Craig
Commissioner

State Department of Social Services

Question: In a case in which a clerk of court exercised juvenile jurisdiction over a child in 1957 and again in 1960, and each time made an award of custody of the child, and the child became 16 years old before the "pending cases" of the former inferior courts were transferred in December, 1970, by virtue of Article IV, Section 21 of the Constitution, to the General Court of Justice in the District Court district involved, was the continuing jurisdiction of the clerk of court in cases of certain children over the age of 16 years provided for by the former G. S. 110-21, transferred to the District Court so that the District Court may now make an adjudication that the child is delinquent, undisciplined, dependent or neglected under Article 23 of Chapter 7A of the General Statutes?

Conclusion: No.

Article IV, Section 21 of the Constitution provides the following:

> "As soon as a District Court shall have been established for a county, all of the provisions of this Article shall become fully effective with respect to the courts in that county, and all previously existing courts inferior to the Superior Court shall cease to exist. All cases pending in these inferior courts shall be transferred to the appropriate division of the General Court of Justice and all records of these courts shall be transferred to the appropriate clerk's office pursuant to rule of the Supreme Court."

However, it is thought that Section 21 of Article IV was primarily for the purpose of effecting an orderly transfer of matters from the old courts to the new courts. If a transfer of *cases* of juveniles

over the age of 16 existing under the continuing jurisdiction of the clerk under G. S. 110-21 was effected by Article IV, Section 21, of the Constitution, it is not perceived that there is anything in Article IV, Section 21 which prohibits the General Assembly from directing the disposition of *cases* so transferred by eliminating them from the *jurisdiction* of the court. If such cases were transferred by the Constitution to the district courts, it appears that jurisdiction in such cases was terminated by G. S. 7A-286 and G. S. 7A-278(1) which together require that jurisdiction over a child continues past his 16th birthday only when the district court has rendered one of four specified adjudications *before* the child became 16 years of age. Affirmative Constitutional authority for this termination of jurisdiction is provided in Article IV, Section 10(4), which states that "The General Assembly shall, by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and powers of the District Courts and magistrates."

Robert Morgan, Attorney General
R. S. Weathers,
Assistant Attorney General

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23 June 1971

Subject: Jails and Jailers; Duties of Jailers to Receive, Incarcerate and Retain Prisoners

Requested by: Colonel Edwin C. Guy, Commander
N. C. State Highway Patrol

Questions: (1) Is it proper for a jailer to require law enforcement officers to act as "turnkey" by incarcerating prisoners brought to the jail by such officers?

(2) Where a jail is maintained by a county, should officers be required to transport prisoners to adjoining counties for incarceration in case of overflow?

Conclusions: (1) No.

(2) No.

In regard to Conclusion (1), G. S. 153-190.1 provides:

> "§ 153-190.1. *Duty to receive and retain prisoners brought in by law enforcement officers.*–It shall be the duty of the jailer of any county jail of this State where there are available facilities to receive, incarcerate and retain any prisoner brought to such county jail by any law enforcement officer of such county or of any municipality in such county or by any law enforcement officer of the State; provided, however, the foregoing provisions shall not be applicable with regard to prisoners arrested by law enforcement officers of a municipality which has its own jail or to prisoners not arrested in the county. Any jailer willfully refusing to comply with the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court."

The above section of the statute places the duty upon the jailer to receive, incarcerate and retain prisoners brought to his jail and makes willful failure to carry out such duties a general misdemeanor. It is not the duty of a law enforcement officer delivering a prisoner to jail to act as "turnkey" and such practice is hazardous at best as such officer would not know the prisoner within the jail nor the degree of care necessary to prevent the escape. Once an officer turns custody of a prisoner over to a jailer, it becomes the jailer's responsibility to incarcerate the prisoner; and the officer would have no further responsibility for such prisoner except where his assistance was needed by the jailer due to an unruly prisoner, in which case all law enforcement officers present should lend such assistance as needed to cope with the situation at hand.

As to Conclusion (2), if a jail is maintained by the county to receive and incarcerate prisoners and a prisoner is ordered incarcerated by the magistrate, he becomes a prisoner of the county and as such is the responsibility of the sheriff or other official of the county

charged with the keeping of the jail.

Robert Morgan, Attorney General
William W. Melvin,
Assistant Attorney General

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23 June 1971

Subject: License and Licensing; General Contractors; Necessity of Requiring License for Installation of Roof Costing Over $30,000.00.

Requested by: Mr. James M. Wells, Jr.
Secretary-Treasurer
State Licensing Board for Contractors

Question: Is it necessary to obtain a general contractor's license under the provisions of G. S. 87-10 to bid or install roofing as a prime contractor when the cost of the project is $30,000.00 or more?

Conclusion: Yes. The General Contractors License Statute requires a prime contractor to obtain a general contractor's license to bid upon or to install roofing as a prime contractor when the cost of the project is $30,000.00 or more.

G. S. 87-1 provides as follows:

> "'General Contractor' defined; exemptions. - For the purpose of this Article, a 'general contractor' is defined as one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building, highway, sewer main, grading *or any improvement* or

structure where the cost of the undertaking is thirty thousand dollars ($30,000.00) or more and anyone who shall bid upon or engage in constructing any undertakings *or improvements* above mentioned in the State of North Carolina costing thirty thousand dollars ($30,000.00) or more shall be deemed and held to have engaged in the business of general contracting in the State of North Carolina." (*Emphasis added.*)

In Webster's Third New International Dictionary Unabridged the word "improvement" is defined as follows:

> "...b: an instance of such improvement: something that improves in this way: as (1): a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs–. . . ."

It is apparent from the definition of the word "improvement" as used in the statute and Webster's definition of the word, that it covers the installation of a roof or building on a structure by a prime contractor, and therefore would require that the person or corporation doing this work as a prime contractor obtain a contractor's license from the State Licensing Board for Contractors under G. S. 87-10.

Robert Morgan, Attorney General
James E. Magner,
Trial Attorney

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23 June 1971

Subject: Criminal Law & Procedure; Weapons; Pistol Permits; Permissible Number of Permits

Requested by: Mr. Leroy Reavis, Sheriff

Iredell County

Question: May a person obtain more than one permit to purchase pistol under G. S. 14-404?

Conclusion: Yes.

A permit issued under G. S. 14-404 allows the permittee to purchase only one pistol. However, the statute does not prohibit the issuance of multiple permits to a single individual. Before issuing any permit, the sheriff must satisfy himself of the "good moral character" of the applicant *AND* that the applicant requires the pistol desired "*for protection of home*."

Robert Morgan, Attorney General
T. Buie Costen,
Assistant Attorney General

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24 June 1971

Subject: Criminal Law & Procedure; Search & Seizure; Search Warrants.

Requested by: Honorable P. B. Beachum, Jr.
District Court Judge
26th Judicial District

Question: Under any circumstances, is a search warrant necessary to search the residence of a person for whom a capias or other warrant of arrest has been issued if such search is made only for the body of the person named therein?

Conclusion: No.

Article 4 of Chapter 15 of the General Statutes, "Search Warrants," makes no mention of a search warrant in support of a warrant of

arrest and provides for search warrants for contraband, evidence, or instrumentality of crime.

Case law speaking to the authority of officers to make forcible entry distinguish search warrants and warrants of arrest. In *State v. Covington*, 273 N. C. 690, at 698, the court said: "Under G. S. 15-44 admittance, in the absence of hostile action from inside the dwelling prior to such demand, must be 'demanded and denied' before a forcible entry is lawful where, as here, there is neither a *search warrant nor a warrant for the arrest of an occupant or supposed occupant*." (*Emphasis added*). Therefore, if an officer is armed with a warrant or capias issued in a criminal action, a search warrant is not needed to search the dwelling of the person charged in the warrant or named in the capias.

State v. Shook, 224 N. C. 728, at 733, reads as follows:

> 4. It appears from the evidence that Holland was an officer, acting under authority of a warrant commanding him to arrest the defendant for a criminal offense. He was therefore not a trespasser in entering upon the premises of defendant in the attempt to apprehend him. In *S. v. Mooring*, 115 N. C., 709, cited by defendant, where the defendant was charged with an assault on an officer who entered the premises in an attempt to make an arrest, *Justice Avery*, writing the opinion of the Court, said:
>
> "'The doctrine that a man's house is his castle, which cannot be invaded in the service of process, was always subject to the exception that the liberty or privilege of the house did not exist against the King.' *Commissioners v. Reynolds*, 21 Am. Rep., 510. Hence, the rules applicable where a forcible entry is effected in order to excute a *capias* issued in a civil action, do not apply in the case at bar. 1 A. & E., 722. The officer did not justify the breaking on the ground that he had a search warrant, but a warrant for the arrest of a particular prisoner, and we are not called upon, therefore, to enter into a discussion of the constitutional safeguards that protect

dwelling-houses against undue search. If the officer have valid process in his hands, he does not become trepasser *ab initio* if he fail to find the accused in the house after breaking the door."

The distinction made in the cited case as to authority of the officer to enter the premises forcibly is between an officer serving civil process and one executing a criminal warrant, and does not refer to differences in the grades of offenses charged in the warrants as affecting such right. An officer in making an arrest under a warrant charging a criminal offense has the authority to break open the doors of the dwelling occupied by the person whose arrest is directed, even during the nighttime. 4 Am. Jur., Arrest, sections 83 and 84; 6 C. J. S., p. 615. Defendant's objection in this regard is not tenable.

The following language appears in 5 Am. Jur. 2d, Arrest, Sec. 88:

§ 88. To arrest under warrant.

A sheriff or police officer, in making an arrest under a criminal warrant, has authority to break open the outer or other doors of the dwelling house of the person whose arrest is directed by the writ, and to enter and search the dwelling to arrest the offender, even during the nighttime. The rule is not limited to cases in which the warrant charges a breach of the peace or a graver offense. From this it follows that an officer who has a warrant for the arrest of a person in a house, and who, on being refused admittance, breaks the door, cannot be treated as a trespasser, although, on search, the defendant named in the process is not found or shown to be in the dwelling at the time. Indeed, it has been held that, when entering the house of the one against whom the warrant reads, the officer is not required to have reasonable grounds to think the accused is in the house at the time.

The search of the person arrested for weapons is permitted for the

safety of the officer. However, in *Chimel v. California*, 395 U. S. 752, 23 L. Ed 2d 685, 89 S. Ct. 2034, the court held that a warrantless search incident to a lawful arrest must be limited to the area into which an arrestee might reach to obtain a weapon or destroy evidence. Such ruling does not prohibit an officer from seizing contraband when seen while merely looking for the person charged. In the event the search is extended beyond the search of the arrestee for weapons or the area into which he might reach to obtain a weapon or destroy evidence, a search warrant would be required.

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